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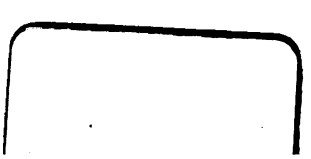

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IN THE

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IN

Trinity Vacation,

IN THE

NINETEENTH AND TWENTIETH YEARS OF THE REIGN OF VICTORIA. 1857.

The Judges present at these sittings were,—

CRESSWELL, J., WILLIAMS, J., AND WILLES, J.

MEMORANDA.

IN the course of the last Trinity Term, the Right Hon. James Stuart Wortley resigned the office of Solicitor-General.

Henry Singer Keating, Esq., one of her Majesty's counsel learned in the law, was shortly afterwards appointed Solicitor-General, and received the honour of knighthood.

In March last, Mr. Serjt. Wrangham, Mr. Serjt. Shee, and Mr. Serjt. Byles, were respectively appointed Queen's Serjeants.

*In Trinity Vacation, the following gentlemen were appointed her Majesty's counsel learned in the law:— [*2

The Hon. Edmund Phipps, of the Inner Temple.
Charles Wordsworth, Esq., of the Inner Temple.
John Locke, Esq., of the Inner Temple.
Allan Maclean Skinner, Esq., of Lincoln's Inn.
John Walter Huddleston, Esq., of Gray's Inn.
Robert Lush, Esq., of Gray's Inn.
John Monk, Esq., of the Middle Temple.
William Forsyth, Esq., of the Inner Temple.
Henry Manisty, Esq., of Gray's Inn.

Mr. Serjt. Pigott received a patent of precedence, to take rank next after John Locke, Esq.

PUGH v. STRINGFIELD and Another. *June* 18.

Where the interest of the covenantees is joint, although the covenant is in terms joint and several, the action follows the nature of the contract, and must be brought in the names of all the covenantees.

P., D., and G. had severally advanced moneys to one F. on mortgage of three several parcels of land, and had severally brought actions against F. For putting an end to the actions, and securing these several debts, an indenture was prepared and executed, to which F. was a party of the first part, P. of the second, D. of the third, G. of the fourth, and certain other persons of the fifth part. By this indenture, F. covenanted to complete certain buildings on the mortgaged premises respectively, according to certain plans, and P., D., and G. covenanted to advance him a certain sum during the progress of the works. The defendants thereupon gave P., D., and G. a guarantee, stating, that, in consideration of the arrangements entered into by them, and their covenanting to advance the moneys mentioned to F. for the purpose of enabling him to complete the buildings, they guarantied that F. should perform his covenants with them in the indenture,—"the joint and separate liability of the defendants not to exceed 100*l.*:"—Held, that P. alone could not maintain an action against the defendants upon the guarantee, the interest of the three therein being joint, and not several.

THIS was an action upon a guarantee.

The declaration stated, that, before the making of the defendants' promise thereinafter mentioned, the plaintiff had advanced to William Few divers sums of money upon mortgage of certain messuages or *3] tenements *upon certain parcels of land situate at Kentish Town and Camden Town, in the county of Middlesex, and Robert Dobbing had also advanced other moneys to the said William Few upon mortgage of other messuages or tenements on other parcels of land also situate at Kentish Town and Camden Town aforesaid; and James Gardner had also advanced other moneys to the said William Few upon mortgage of other messuages or tenements on other parcels of land also situate at Kentish Town and Camden Town aforesaid, and certain arrangements had been entered into between the plaintiff and the said Robert Dobbing and James Gardner and other parties respectively with the said William Few touching their said several mortgages and properties, and which arrangements were expressed, contained, or referred to in an indenture which had, at the time of the making by the defendants of their promise thereinafter mentioned, been prepared and made, or intended to be made, between the said William Few of the first part, the plaintiff of the second part, the said Robert Dobbing of the third part, the said James Gardner of the fourth part, and E. M. Dimmock and R. Burbey of the fifth part, whereby, after reciting, amongst other things, that the several persons parties thereto of the second, third, and fourth parts, had theretofore from time to time advanced and lent to the said William Few divers large sums of money, for the purpose of enabling the said William Few to erect and build the said messuages or tenements and dwelling-houses so situate upon the said parcels of land in Kentish Town and Camden Town aforesaid, and which parcels of land were recited to be and were in fact held under several leases or agreements for leases thereof respectively granted to him the said William Few; and also reciting, that, upon accounts being taken and settled between the said several parties thereto of the first, second, third, *4] *and fourth parts, of the moneys that had been from time to time advanced and lent to the said William Few by the said parties of the second, third, and fourth parts respectively, it appeared that the said

William Few was indebted to the plaintiff in the sum of 23,733*l.* 16*s.* 10*d.* or thereabouts, and that the said William Few was also indebted unto the said Robert Dobbing in the sum of 1700*l.*, or thereabouts, and that the said William Few was indebted unto the same James Gardner in the sum of 450*l.* or thereabouts, and the repayment of the said several sums of money, with interest thereon, had been respectively secured by the said William Few to the plaintiff, Robert Dobbing, and James Gardner, by several indentures of mortgage and agreements for mortgage respectively; and after reciting further as therein mentioned, and also that divers actions had been brought against William Few by the several parties thereto of the second, third, fourth, and fifth parts, having respectively relation to the several dealings and transactions between the said several persons parties thereto, and that an arrangement had been entered into and agreed upon by the said several persons parties to the said indenture, for the purpose of settling their disputes, and by a memorandum of agreement bearing date the 11th of October, 1856, and made between the said William Few of the one part, and the said E. M. Dimmock of the other part, the said E. M. Dimmock being therein described as acting on behalf of himself and of the said R. Burbey, and also on behalf of the said parties thereto of the second, third, and fourth parts, it had been agreed, amongst other things, that the said E. M. Dimmock should, on the execution of the covenant thereinafter mentioned (meaning thereby the then being recited indenture), pay to certain creditors of the said William Few, including the defendants, the sum of 1000*l.*, in certain proportions, and that the said William *Few should, as therein mentioned, execute an assignment to the said E. M. Dimmock, or as he should direct, of the equity of redemption of and in the said several pieces of ground, messuages, and tenements, and should covenant (with sureties as in the reciting agreement mentioned) to complete and finish to the satisfaction of the surveyor of the plaintiff and the said Robert Dobbing and James Gardner, and according to his specification and conditions, on or before the 10th of January then next, the said several messuages or tenements situate on the property at Kentish Town and Camden Town aforesaid, and then mortgaged to the plaintiff and the said Robert Dobbing and James Gardner respectively as aforesaid, including as therein mentioned; and also reciting that the said William Few had, in pursuance of the agreement contained in the said recited memorandum of the 11th of October, 1856, by several indentures assigned or otherwise assured unto the several parties thereto of the second, third, and fourth parts all the estate, right, title, interest, equity of redemption, benefit, claim, and demand of him the said William Few, of, in, or to the said several pieces or parcels of land, messuages, or tenements and premises respectively whereof they were such mortgagees, respectively as aforesaid, subject, nevertheless, to the several rents and covenants, conditions and agreements of the several leases and agreements for leases under which the same were held; and also reciting that the said William Few had, in further pursuance of the said recited agreement, supplied sureties who had been approved of by the said E. M. Dimmock, who, by a memorandum or guarantee bearing even date therewith (meaning thereby, amongst others, the defendants' guarantee thereinafter mentioned), severally guarantied and agreed that the said William Few should duly and properly perform the covenants on [*5

*6] his part for the *completion and finishing of the several messuages and tenements in Kentish Town, &c., thereinafter contained,—it was by the then being recited indenture witnessed, that, in pursuance of the said agreement, and for the considerations therein mentioned, the said William Few covenanted and agreed to and with the said parties thereto of the second, third, and fourth parts, *their respective executors, administrators, and assigns*, that he the said William Few, his executors or administrators, would, on or before the 10th of January which would be in the year 1857, complete and finish to the satisfaction of such surveyor for the time being who might be jointly appointed by the parties thereto of the second, third, and fourth parts, their respective executors, administrators, or assigns, and pursuant to and in accordance with the plans, specification, and conditions already prepared by Mr. G. Low, the surveyor then acting on behalf of the parties thereto of the second, third, and fourth parts, and signed by him the said William Few, the said several messuages or tenements situate and being at Kentish Town and Camden Town aforesaid, and comprised in the said several indentures of mortgage, including the making of all roads and pavements, and laying out gardens to the extent of making paths therein (subject, nevertheless, to the proviso for reference to arbitration thereinafter contained): and it was thereby agreed and declared by and between the several parties thereto of the first, second, third, and fourth parts, their respective executors, administrators, and assigns, that he the said William Few, his executors or administrators, should be entitled to require from such surveyor, when the said several messuages or tenements were so respectively finished and completed, a certificate of the compliance by him the said William Few as therein mentioned: and by the said indenture the said

*7] parties thereto of the second, third, and fourth parts did jointly, *and every of them did thereby for himself severally, and for his respective heirs, executors, administrators, and assigns, covenant and agree to and with the said William Few, his executors and administrators, in manner following, that was to say, that they the said parties thereto of the second, third, and fourth parts, and their respective executors, administrators, and assigns, should and would advance to the said William Few, for the purpose of enabling him to complete the said messuages or tenements and premises at Kentish Town and Camden Town aforesaid the sum of 1557*l.*, such sum to be advanced as the work should proceed, in weekly payments, upon the certificate of the said surveyor, and each of such certificates to be applicable to the work done towards the completion and finishing of the said messuages or tenements and premises during the seven days next preceding the date thereof: and by the said indenture it was further agreed, that, if any dispute or question should arise between the said parties thereto, or between any one or more of them and the executors or administrators of the other or others of them, or between their respective executors or administrators, touching any clause, covenant, matter, or stipulation in the said indenture contained, or the construction thereof, or any other matter arising out of the said indenture, the same should be referred to arbitration, as therein provided for: and thereupon, the said indenture having been so prepared as aforesaid, the defendants made and signed a memorandum or agreement in the words and figures following, that is to say:—

"London, 24th October, 1856.

"Gentlemen,—In consideration of the arrangements entered into by you with Mr. William Few, of, &c., builder, and of your covenanting to advance to him, for the purpose of enabling him to complete and finish certain messuages or tenements situate at Kentish Town *and Camden Town, Middlesex, according to the plan, specification, and conditions already prepared, and signed by the said William Few, and which covenant and agreement are respectively contained in a certain indenture of even date herewith, made between the said William Few of the first part, Charles Pugh of the second part, Robert Dobbing of the third part, James Gardner of the fourth part, and E. M. Dimmock and R. Burbey of the fifth part, we, the undersigned John William Springfield and John Groves Cooper, of, &c., do hereby *jointly and severally* guaranty and agree that the said William Few shall duly and properly perform and fulfil the covenant entered into by him with you, and contained in the said indenture of even date herewith, for the completion and finishing, upon the terms and subject to the conditions therein mentioned, of the several messuages or tenements mentioned or comprised in the several indentures of mortgage in the said indenture of even date herewith mentioned, it being, nevertheless, agreed and declared that our joint and separate liability under or by virtue of this guarantee or agreement shall not exceed the sum of 100*l.* [*8

"We are, gentlemen, your obedient servants,

"JOHN W. SPRINGFIELD,

"J. GROVES COOPER.

"To Messrs. Charles Pugh, Robert Dobbing, and James Gardner."

Averment, that the said persons to whom the said memorandum or agreement was addressed were and are the plaintiff and the said Robert Dobbing and James Gardner, who are all yet alive, and that the said William Few, and the arrangements, covenants, agreement, indentures, messuages, and tenements, were and are the said William Few, and the arrangements, covenants, agreement, indentures, messuages, and tenements respectively aforesaid: Breach, that, although all things *had happened and been done, and all times had elapsed reasonable and necessary to entitle the plaintiff to have the said covenant and agreement performed by the said William Few, and also to have the defendants' said guarantee and agreement performed by them, yet the said William Few had wholly neglected and failed to perform his said covenant so entered into by him with the plaintiff, and contained in the said indenture, for the completion and finishing the said last-mentioned messuages or tenements, and the plaintiff had thereby sustained damage to a greater amount than the sum of 100*l.*; and although all things had been done and happened, and all times had elapsed, reasonable and necessary to entitle the plaintiff to have and receive of and from the defendants the said sum of 100*l.*, yet the same had not been paid to the plaintiff: and the plaintiff claimed 100*l.* [*9

To this declaration the defendants demurred, the ground of demurrer being, "that Messrs. Dobbing and Gardner ought to have been joined as co-plaintiffs." Joinder.

Atherton, Q. C. (with whom was *W. Brandt*), in support of the demurrer.—The memorandum declared on being in terms an undertaking by the defendants with the plaintiff and Dobbing and Gardner, it is not

competent to the plaintiff to sue alone for the breach of it. The general rule, as laid down in Eccleston *v.* Clipsham, 1 Wms. Saund. 153, and the notes thereto, is, that, though a covenant be *joint and several* in the terms of it, yet, if the interest and cause of action be *joint*, the action must be brought by all the covenantees. That rule, no doubt, is subject to an exception, that, though the covenant is in terms with several jointly, yet, if the beneficial interest of each is several, and there is no *10] interest to any two, one may sue in respect of a breach *affecting his several interest. The rule is laid down in similar terms in 1 Chitty on Pleading, 7th edit. p. 9. This case does not fall within the exception. There is no such clear and distinct separate interest in the plaintiff as to entitle him to sue alone. It appears that one Few, for whose benefit the memorandum of guarantee was signed, having obtained advances of money from three several persons,—the plaintiff, Dobbing, and Gardner,—to whom respectively he had granted mortgages of several premises, and being in want of further advances, entered into an arrangement with the plaintiff and Dobbing and Gardner and two other persons named Dimmock and Burbey, under which he was to receive further advances; and the guarantee was given for the due carrying out that arrangement by Few. It is clear that the consideration for the defendants' promise was not in part and severally moving from the plaintiff and Dobbing and Gardner, but from all three of them in common. Part of the arrangement as shown on the face of the deed undoubtedly is a covenant by Few with the three mortgagees to complete and finish, to the satisfaction of their surveyor, the premises mortgaged to them respectively, and any breach of that covenant would have given to each a separate cause of action. The defendants guarantied to the plaintiff, Dobbing, and Gardner the due performance of Few's engagement, subject to this stipulation, that their joint and separate liability under or by virtue of the guarantee should not exceed the sum of 100*l.* How is that sum to be divided? Is each to have a separate action for 33*l.* 6*s.* 8*d.*? or are the defendants liable to each to the extent of 100*l.*? [CRESSWELL, J.—You say that Few's covenant is several, but that the guarantee is joint?] Exactly so: the guarantee is joint, though to a certain extent it has reference to a separate covenant. The considera- *11] tion for the *guarantee consists of two parts,—the first is the arrangements entered into by the plaintiff, Dobbing, and Gardner, with Few, and these are for the most part joint,—the second is the covenant for the further advances, which is entirely joint: it is not the less joint, because it is also several. Few would have been guilty of a breach of his covenant to complete the premises, if he failed to complete either of them. If the action had been brought by the three, they would, on proving the breach, have recovered the 100*l.* in which they have a joint interest, and then they could have divided it.

Field, contrà.—It is submitted that the action is well brought in the name of Pugh alone in respect of the damage which he has sustained from the breach of Few's covenant. In a case not very dissimilar to this,—Keightley *v.* Watson, 3 Exch. 716,†—Pollock, C. B., says: "I consider that the inquiry really is, as to the true nature of the covenant; at the same time bearing in mind the rule,—a rule which I am by no means willing to break in upon,—that the same covenant cannot be treated as joint or several at the option of the covenantee. If a cove-

nant be so constructed as to be ambiguous, that is, so as to serve either the one view or the other, then it will be joint, if the interest be joint, and it will be several, if the interest be several. On the other hand, if it be in its terms *unmistakably* joint, then, although the interest be several, all the parties must be joined in the action. So, if the covenant be made clearly several, the action must be several, although the interest be joint." And Parke, B., says: "It is impossible to say that parties may not, if they please, use joint words, so as to express a joint covenant, and thereby to exclude a several covenant, and that, because a covenant may relate to several *interests, it is therefore necessarily not to be construed as a joint covenant." There, the words [*12 of the covenant were ambiguous, and consequently the right of action was held to follow the interest, which was several. So, in Withers *v.* Bircham, 3 B. & C. 254 (E. C. L. R. vol. 10), 5 D. & R. 106 (E. C. L. R. vol. 16), by deed reciting the grant of two distinct annuities to A. and B. during the life of the grantors and the survivor, it was witnessed that C. covenanted with A. and B., and their executors, to pay the annuities or either of them, when the grantors should make default in payment: A. died: and it was held, that, the interest in the annuities being several, the covenant was also several, and that, the annuity granted to A. being in arrear, his executor might maintain an action against C. Here, Few covenants with Pugh, Dobbing, and Gardner, and *their respective executors, administrators, and assigns;* and the same expressions occur throughout. Servante *v.* James, 10 B. & C. 410 (E. C. L. R. vol. 21), 5 M. & R. 299, is hardly distinguishable from the present case. There, a covenant was entered into by the master of a vessel with the several part owners and their *several and respective* executors, administrators, and assigns, to pay certain moneys to them and to their and every of their several and respective executors, administrators, and assigns, at a certain banker's, and *in such parts and proportions* as were set against their several and respective names: and it was held that this was a several covenant, upon which each covenantee must sue severally in respect of his several interest, and that they could not maintain a joint action. "The covenants in question," says Bayley, J., "are made with the several part owners of the vessel, and their *several and respective executors, administrators, and assigns;* which latter words would be quite inoperative if the right to sue were in all the parties jointly. Again, the covenant to pay the money is not to pay it to the owners generally, but to pay it to them *and their and every of their several and respective executors, [*13 &c., at a certain place, *in such parts and proportions* as were set against their several and respective names. He was not to pay it so that the banker might make distribution, but was to make the distribution himself; and, if he paid in the proportions of some and not others, each of those would be injured in respect of the non-payment of his share. In case of the death of one part owner, by the words of the covenant his personal representative might sue. If the covenant were joint, the executor of the survivor only could maintain an action; but such a construction would be quite at variance with the words *their several and respective executors,* &c. In Palmer *v.* Sparshott, 4 M. & G. 137 (E. C. L. R. vol. 43), 4 Scott, N. R. 743, by an agreement between A. of the one part, and B. and C. of the other part,—reciting

that B. and C. had assigned certain property to A. for 150*l.* apiece, and that it had been agreed that A. should retain 50*l.* out of each of the purchase-moneys,—the defendant, in consideration of the two several sums of 50*l.* and 50*l.* so retained, promised B. and C. to indemnify "them and their and each of their estates" from the costs of a certain action: and it was held that C. might sue A. alone upon this promise, without joining B. Tindal, C. J., there said: "It appears to me that this case falls within the principle, that, where a man covenants with two or more *jointly*, yet, if the interest and cause of action of the covenantees be *several* and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action for his particular damages, notwithstanding the words of the covenant are joint; as established in Windham's Case, 5 Co. Rep. 7 a, and others. Here, the agreement was certainly joint in its terms, but the interest of the parties was distinct and separate. Each party had, in effect, advanced the sum of
*14] 50*l.*; each had sustained *a separate damage; and each, therefore, might sue without joining his co-promissee." In Jones *v.* Robinson, 1 Exch. 454,†—the declaration stated that the plaintiff and A. B. carried on business in copartnership, and, in consideration that the plaintiff and A. B. would sell the defendant the business, and would become trustees for him in respect of all debts, &c., due to the plaintiff and A. B. in respect thereof, the defendant promised the plaintiff to pay him all money he had advanced in respect of the copartnership, and for which it was accountable to the plaintiff: the declaration then averred that the plaintiff and A. B. did sell the business to the defendant, and that, at the time of the promise, the plaintiff had advanced a certain sum, and alleged for breach non-payment of that sum: and, upon motion in arrest of judgment, it was held that it was not necessary to join A. B. as a co-plaintiff, and that the declaration was good. "It is true," said Parke, B., "that no stranger to the consideration can sue; but, in the present case, the separate interest of the plaintiff in the partnership fund is the consideration upon which the promise is founded; and this case does not fall within the rule for which the defendant contends," viz., that, in actions ex contractu, all the parties from whom the consideration moves must be joined. Here the interest of the plaintiff and of Dobbing and Gardner was several, the damage which would result from Few's breach of covenant was several, and consequently the remedy must be several. No cause of action could arise to Pugh because Few had omitted to perform that part of his covenant which had relation to the completion of the premises in mortgage to Dobbing and Gardner respectively, and e converso. [WILLIAMS, J.—How would the defendants deal with three actions brought against them at the same time in respect
*15] of the breach of this covenant? How would he *plead?] It would be a question of damages, not of pleading. [WILLES, J.—Each set of premises might have advanced towards completion in different proportions. Having ascertained the proportion in one action, the plaintiff would not be bound by it in the next, or the next action.] There may arise difficulties in dealing with this contract, but nevertheless it is the contract into which the parties have entered. The defendants' engagement is not that they will pay Pugh 100*l.*, but they guaranty to Pugh, Dobbing, and Gardner, to that extent, that Few shall perform the covenant he has entered into. [CRESSWELL, J.—If the defendants' liability

is limited to 100*l.*, it cannot be in the way in which you propose to construe the contract. The difficulty that construction presents shows that it cannot be the true one.]

Atherton was heard in reply.

CRESSWELL, J.—It appears to me, that, consistently with the cases which have laid down the rule as to when covenants are to be joint or several, our judgment upon this demurrer must be for the defendants. If it could have been contended that the guarantee was for three sums of 100*l.*, one to each of the three parties, the case might have been different. But Mr. *Field* at once admitted that he could not so contend. The difficulties of dividing the single sum show plainly that it must have been intended to be a joint, and not a several contract.

The rest of the court concurring,

Judgment for the defendants.

In Calvert *v.* Bradley, 16 How. U. S. 580, where a lease was made by several owners of a hotel, reserving a rent to each one in proportion to his interest, and there was a covenant on the part of the lessee that he would keep the premises in good order and condition; and, at the end of the term, surrender them in like repair, it was held that this covenant was joint as respects the lessors, and that one of them could not sue thereon alone. In this case, and in Bartlett *v.* Holbrook, 1 Gray, Mass. 114, the general rule laid down in Slingsby's case, 3 Rep. 18, and recognised in the text, that where the interest is joint the covenantees must sue jointly, though the covenant may be in its terms joint and several, was expressly followed. See also, on this subject, Shearman *v.* Akins, 4 Pick. 283; McCready *v.* Freedly, 3 Rawle 251; Ludlow *v.* McCrea, 1 Wend. 223; Sweigart *v.* Berks, 8 Serg. & R. 308; Clark *v.* Cable, 2 Missouri 223; Lahy *v.* Holland, 8 Gill 251; Jewett *v.* Cunard, 3 Wood. & Min. 277.

*DUFF *v.* MACKENZIE. *July* 4. [*16

An insurance was effected on "*master's effects*, valued at 100*l.*, *free from all average*." Some of the articles thus insured were totally lost by the perils insured against, but others were saved:—Held,—distinguishing the case from Ralli *v.* Janson, 6 Ellis & B. 422,—that the assured was entitled to recover in respect of the goods which had been so totally lost; the word "effects" being obviously employed to save the enumeration of the different articles of which the subject-matter of insurance consisted.

THIS was an action brought in respect of a total loss, on a policy of insurance on "master's effects," valued at 100*l.*, "free from all average." The declaration averred a total loss by a peril insured against, viz., fire.

The defendant pleaded that the said effects insured by the said policy were not wholly destroyed and lost, as alleged. Issue thereon.

The cause was tried before Cockburn, C. J., at the sittings in London, after last Hilary Term. It appeared that the plaintiff was master of the ship Lion, of Scilly; that, during the period covered by the policy, the Lion, being off St. Vincent, took fire, and was totally destroyed, the captain and crew escaping on board a Dutch galliot; that the plaintiff

succeeded in saving a portion (about one-third) of his effects, the remainder being lost.

The subjoined lists of the articles lost and saved respectively, with their respective values, were put in as the foundation of the plaintiff's claim:—

"The following is a list of the articles lost by me, from fire, on board of the brig Lion, of Scilly, of which I was master, Feb. 2d, 1856:—

	£	s.	d.
"Feather-bed	5	0	0
"Barometer	2	5	0
"1 Book of charts	12	10	0
"1 Three Channel chart		12	6
"1 General chart of the Mediterranean		14	0
"A chart of the world		12	0
"A chart of the coast of Newfoundland		12	0
"A chart of the Scilly Isles		4	6
"1 Spy-glass	1	10	0
"½ dozen silver tea-spoons	1	12	6
"Water filter		10	6
"2 Chests	1	6	0
"Set of casters		4	6
"1 Bag of slops, consisting of 8 blue shirts, 10 pairs of duck trowsers, and ½ dozen knives	4	11	0
"Clothing, consisting of trowsers, coats, oil-cloths, sea boots, bedding, &c.	25	0	0
"Chronometer (damaged)	5	0	0
"½ dozen wine glasses		4	6
"Three metal table-spoons		4	6
"Two chairs	1	5	6
"1 Time-piece	1	10	0
"Books of different titles	6	10	0
"Six table-cloths, and one table-cover	1	13	6
"1 Parallel ruler and one scale		8	6
"Two dividers		2	6
"1 Quadrant rendered useless by throwing about	4	10	0
"1 writing desk injured; repairs		5	0
"Tell-tale	1	5	0
"½ dozen knives and forks		6	0
	£80	9	0

"List of effects saved from the late brig Lion, of the port of Scilly:—

	£.	s.	d.
"Watch	4	0	0
"Chronometer	35	0	0
"Two suits of clothes	4	0	0
"And various other items	2	0	0
	£45	0	0

*18] *On the part of the defendant it was insisted, that, inasmuch as the insurance was expressly made "free from all average," and

a portion of the subject of insurance had been saved, the plaintiff was not entitled to recover: and reliance was placed upon the case of Ralli *v.* Janson, 6 Ellis & B. 422 (E. C: L. R. vol. 88), where it was held by the Exchequer Chamber,—reversing the judgment of the Court of Queen's Bench —that, where memorandum goods of the same species, shipped in packages, are insured, and it is not expressed, by distinct valuation or otherwise, in the policy, that the packages are separately insured, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only (not being general average), if there be no stranding, though one or more entire package or packages be entirely destroyed, or otherwise totally lost, by the specified perils.

Upon the authority of that case, though with very great reluctance, his Lordship directed a nonsuit; but he reserved leave to the plaintiff to move to enter a verdict for him for 67*l.* 10*s.* or for 62*l.* 10*s.*, if the court should be of opinion that the clause of warranty against average in the policy did not disentitle the plaintiff to recover.

Bovill, Q. C., in Easter Term last, obtained a rule nisi accordingly.

James Wilde, Q. C., in Trinity Term, showed cause.—The policy is upon "master's effects" valued at 100*l.*, "warranted free from all average." It is submitted, that, upon the true construction of this instrument, the assured could only recover in respect of a total loss: and that, a portion of the subject-matter of insurance having been saved, there has been no total loss. The case of Ralli *v.* Janson has settled the law *upon this subject. Formerly, it was held, upon the authority of Davy *v.* Milford, 15 East, 559, that, where the goods are contained [*19 in separate packages, there might be a total loss of part, though some of the packages might be saved. Ralli *v.* Janson, however, decides that there is no foundation for the distinction supposed to arise from the goods being contained in separate packages,—although it leaves it still open to contention, that, where there are several distinct subjects of insurance in the body of the policy, or by declaration of interest by endorsement, the assured is entitled to recover as for a total loss if all of one species of goods insured should be lost. In that case, the insurance was upon 2688 bags of linseed. The vessel, having met with a hurricane, in the course of which it became necessary to throw part of the goods overboard to lighten her, was ultimately driven into the Cape of Good Hope, where 1023 bags were found to be in such a state from sea-damage that a large portion of the linseed in them was thrown into the sea as rotten and worthless, and the rest was sold, and only realized a few shillings, and, if sent on in the vessel, would have lost the character of linseed before arrival in England. The plaintiffs insisted that they were entitled to recover in respect of this loss, notwithstanding the terms of the memorandum, by which seed, &c., were warranted free from average, unless general, or the ship should be stranded, on the ground that the loss was not in its nature an average, but a total loss. In giving the judgment of the court, Jervis, C. J., says: "It was not denied, that, if the linseed had been shipped in bulk, and an equal or even greater portion of it had been lost in a similar way, the warranty would have exempted the underwriters from liability. This is now too clear to admit of any serious doubt. But it was said that the fact that the cargo was shipped in bags *made a difference, and that, by reason of the shipment having [*20 been made in that form, the warranty must be held to apply, not

to the whole cargo, as in the case of a shipment in bulk, but to each bag as being a distinct object capable of separate insurance and valuation, and that, as 1023 entire bags had been lost, there was a total loss of each of those portions of the cargo; and the warranty against particular average consequently inapplicable. If this proposition be sustainable, that the warranty is upon each bag, and not upon the cargo consisting of all the bags, either upon the natural construction of the memorandum, or in any sense in which it has been construed by former decisions binding upon us, the plaintiffs are entitled to recover. As to its natural construction, there is no difficulty. The memorandum was introduced for the protection of the underwriters against partial losses of the subject-matter insured. It is framed in general terms, and must therefore, according to the well-known rule of construction, be applied to the whole of each subject-matter falling within its terms, except such construction be limited or controlled by reference to other parts of the policy. Thus, in the particular case of seed, the warranty applies in terms to all seed loaded on board the vessel, without restriction to seed loaded in bulk or in any particular manner, unless it appear by the terms of the policy, as, for instance, by separate valuation, that it was intended to distinguish one portion of the seed from another, and to make a separate insurance upon each portion, as well as a joint one upon all. There is for this purpose no difference in point of reason between the total loss, by the same perils, of part of a cargo loaded in bulk, and part of the same cargo loaded in bags, each being equally a total loss of part but equally a partial loss of the whole. The fact of the cargo being in bags only renders it more practicable to value *21] and *insure each bag-full separately: but, in the absence of a separate valuation, or other similar expression, to indicate an intention to insure each package severally as well as the whole jointly, it does not of itself show that the policy, which is in terms upon the whole, was intended to apply severally to each particular bag, any more than it would apply to each separate particle of a cargo loaded in bulk. If the case were free of authority, therefore, we should have felt no difficulty in holding that the memorandum applies to the whole of each species of which the cargo consists, whether in bulk or in packages, unless the packages be separately valued or otherwise separately insured, which in the present case they are not. The plaintiffs below, however, insist that it has been established by authority, and is settled law in this country, that if a cargo of perishable goods, warranted free of particular average, be made up of several packages, each capable of a distinct valuation, and any one package of these be entirely lost, there is a total loss of such package, for which the underwriters are liable, notwithstanding the warranty, and though the rest of the cargo arrive in safety." His lordship cites and observes upon the following authorities,—Lewis *v.* Rucker, 2 Burr. 1167, Davy *v.* Milford, 15 East 559, Hedburg *v.* Pearson, 7 Taunt. 154 (E. C. L. R. vol. 2), 2 Marsh. 432 (E. C. L. R. vol. 4), Cologan *v.* The London Assurance Company, 5 M. & Selw. 447, Hills *v.* The London Assurance Corporation, 5 M. & W. 569,† Navone *v.* Haddon, 9 C. B. 30 (E. C. L. R. vol. 67), Glennie *v.* The London Assurance Company, 2 M. & Selw. 371, Stevens on Average, 5th edit. 224, 225, Dyson *v.* Rowcroft, 3 Bos. & P. 474, Arnould on Insurance 1038, Valin, Commentaire sur l'Ordonnance de la Marine du mois d'Août, 1681, liv. iii., tit. vi., des Assurances, Art. 47 (Vol. 2, p. 113), Eméri-

gon, Traité des Assurances, cap. 12, §§ 45, 46 (2d volume of the edition by Boulay-Paty, pp. 8–20), Pothier, Du Contrat d'Assurance, No. *163, Phillips on Insurance, §§ 1536, 1773, Code de Commerce, 369, Dictionnaire du Contentieux Commercial, tit. Délaissement, n. 45, —and concludes as follows:—"We are of opinion, that, where memorandum goods of the same species are shipped, whether in bulk or in packages, not expressed by distinct valuation or otherwise in the policy to be separately insured, and there is no general average, and no stranding, the ordinary memorandum exempts the underwriters from liability for a total loss or destruction of part only, though consisting of one or more entire package or packages, and though such package or packages be entirely destroyed or otherwise lost by the specified perils." Here, the policy being general, on "master's effects,"—which are not to be distinguished from other goods,—the whole forms one subject-matter of insurance, and there can be no partial loss. [COCKBURN, C. J.—If your argument be tenable, the assured would have no claim, if, in escaping from the wreck, he saved a suit of clothes, or even a single garment!] The same absurdity might equally have been suggested in Ralli *v.* Janson. This is a valued policy: the underwriters have consented to a valuation of the whole subject-matter of insurance, but not to a valuation of any part thereof by any one else. That being so, it is impossible that this can be held to be a separate insurance of articles which are never mentioned. [*22

Bovill, Q. C., and *Archibald*, in support of the rule.—The very terms of this policy, it is submitted, imply that there are several distinct subjects of insurance: and there is nothing in the decision of the court in Ralli *v.* Janson to disentitle the plaintiff to recover as for a total loss of those "effects" which were entirely lost. The rule as laid down in Magens on Insurances, p. 74, § 61, is as follows:—"Ever since the year 1749, *it has been the custom in England, as it was before in other countries, as mentioned in § 14 [*a*], that no particular average shall be paid by the insurers, under 3 per cent.: even general averages are not paid at Hamburgh, if the damage be less than that; but, in London, those averages that are general, are satisfied, be they ever so small. We must here remark, that almost all ordinances seem deficient in not fully explaining when and after what manner the damage shall be deemed to exceed 3 per cent. We shall, to elucidate this matter, descend to particular circumstances. If in a chest containing one hundred pieces of linen, three are deducted for damage, and as such allowed to the buyer, the loss ought to be recoverable from the insurers, whether that chest was in a policy by itself, or amongst a parcel of an hundred chests: for, why should not a person who has insured and paid an equal premium for an hundred chests have the same advantage as he that is insured but for one? Suppose a merchant has shipped 101 chests of goods, No. 1 to 101, of which, on arrival, three chests are by sea or other accident so spoiled as to be worth nothing: if the damage be calculated as on the whole value of 101 chests, it will not exceed 3 per cent., and is by most insurers thought not to be recoverable by the insured, especially if the insurance be made without expressly declaring in the policy the particular sum insured on each chest. We cannot help thinking, however, that, if such a case came to be rightly explained to a jury of merchants, the insurers would be condemned to pay the [*23

value of these three chests, in the same manner as they would, if it had been expressed how much was insured on each chest, or as if the 101 chests had been insured in five different and distinct policies: as, for example, No. 1 to 20, in one policy,—21 to 40, in a second,—41 to 60, in a third,—61 to 80, in a fourth,—and 81 to 101, in a fifth. The *24] insurers in this case, *supposing a loss or damage of one chest of the goods specified in each of the three first policies, must unquestionably have paid the average, which would have amounted to 5 per cent., because the loss of a chest would have been one in twenty: and, further, it might be considered as quite a different thing to find whole chests spoiled. The law or custom by which the insurers are not obliged to pay any particular average under 3 per cent. was probably established in order to free them from the vexation of being called upon for every trifling damage that might happen to a few pieces in a chest or bale. We are of opinion, that, notwithstanding an insurance is made under the general name of 'merchandises,' at least each different parcel or kind of goods ought to be considered by itself, and the insurers made liable for what damage exceeds 3 per cent. in such a parcel. However, as we have as yet no settled rules in this point, the best way is, to set matters out of dispute by explications in the policy: and no reasonable insurer ought to object to any division or fixing particular values on parcels of bale goods. If a person ships 1000 pieces of long-ells divided into 50 bales of 20 pieces, each piece worth 1*l.*, he may say 1000*l.* on 50 bales, at 20*l.* per bale, and then the insurer will be liable for 3 per cent. damage on each bale. But no insurer ought to admit any division in the value of goods of another nature, such as, sugar, hemp, oil, when the exemption of 5 or 10 per cent. average is from other considerations." [CRESSWELL, J.—The first part of that is overruled by Ralli *v.* Janson.] It is: but the latter part is quite in point here. Mr. Stevens, treating of the memorandum,—Stevens & Benecke on Average (Boston edition of 1833), p. 399,—says: "Various clauses are inserted in policies to guard the assured against the effect of the words which are the subject of this article. The following are generally made use of, viz., where *25] *several species of colonial produce are insured, it is usual to insert,—'*to pay average on each species, as if separate interests, separately insured;*' on manufactured goods in bales, trunks, or cases, &c.—'*to pay average on each package, as if;*' &c.; on sugar, '*to pay, average on each ten, fifteen, twenty hhds.*' (as the agreement may be), '*succeeding numbers, as if,*' &c., and in like manner. It is now, indeed, considered so much agreeable to usage, where goods are insured direct from the place of growth or manufacture, that, if the clauses, 'to pay average on each *species*' of produce, or 'on each *package*' of manufactured goods, are not inserted, yet a liberal construction is put on the omission, and the policy is acted on as if they were. The reason is this: that no objection would have been made to it when the insurance was effected, and in consequence it is considered in practice as a mere verbal omission of the broker, and treated as such:—agreeably to the opinion of Magens, who says, 'In an insurance made generally on goods, each different parcel or kind of goods ought to be considered by itself.'" Benecke says,—edit. 1824, p. 474,—"It has frequently been asked whether the warranty 'free from average under 3 per cent., or under 5 per cent.,' liberates the underwriter from the total loss of a part,

such loss amounts to less than 3 or 5 per cent. upon the whole quantity of goods valued in one sum: for instance, if 101 chests of goods (each of them being supposed of the same value) be insured together, and three chests be totally damaged, so as to be worth nothing, whether the loss be recoverable from the underwriter? This question admits no longer of any doubt, since it has been determined that underwriters are liable for the total loss of a part, and consequently such loss is not considered as an average loss. If, therefore, the three chests are either gone to the bottom, or completely destroyed by fire, or rendered *entirely useless by the effect of sea-water, this will not be an average loss, [*26 but a total loss *pro tanto;* but, if they remain of any value, however small, it will be an average loss, and the underwriter discharged. In the same manner, if of twenty-one hhds. of sugar, insured in one valuation, one is completely washed out, so as to be literally worth nothing, it will be a total loss of a part; but, if any sugar remain in it, it will be a particular average." For this, the learned author refers to Davy *v.* Milford, 15 East 559. [*James Wilde*, Q. C.—Which is expressly overruled by Ralli *v.* Janson.] The argument on the other side leads to such manifest absurdity, inasmuch as it must be contended that the loss is not total if anything, however small,—a pair of spectacles, or an artificial tooth,—were saved, that the parties never could have intended that such a construction should be put upon their contract. In Lewis *v.* Rucker, 2 Burr. 1167, 1170, Lord Mansfield says: "If part of the cargo, capable of a several and distinct valuation at the outset, be *totally* lost: as, if there were 100 hhds. of sugar, and ten happen to be lost, the insurer must pay the prime cost of these ten hhds., without any regard to the price for which the other ninety may be sold." The opinion of Lord Ellenborough in Davy *v.* Milford, 15 East 559, is confirmed by this court in Hedburg *v.* Pearson, 7 Taunt. 154 (E. C. L. R. vol. 2), 2 Marsh. 432 (E. C. L. R. vol. 4). And in Hills *v.* The London Assurance Corporation, 5 M. & W. 569, 576,† Lord Abinger says: "That was the case of a loss on a policy of insurance upon sugar, where each hogshead was separately valued and insured; and therefore a loss of one was properly held to be a total loss of that hogshead. But, on the other hand, in the case of Hedburg *v.* Pearson, where a part of each hogshead was saved, the jury having stated their opinion that the loss was an average one, and found accordingly, the court held that they were right in so doing. The law had been *settled in many cases [*27 before, that, where the insurance is upon each package separately, is to be treated as a total loss upon each package lost; but, when it is an insurance upon the bulk, unless the loss exceed a certain value upon the particular article, there is no *average* loss; and there cannot in such a case be any *total* loss of a portion only of the cargo."(*a*) In Arnould on Insurance, vol. 2, p. 1038, the rule is distinctly laid down, in accordance with all the authorities, as follows: "It is an undoubted doctrine in the English law of marine insurance, that, if a cargo of perishable goods be made up of several distinct packages, each capable of a separate valuation, and one or more of these be entirely lost, there is an absolute total loss upon every such package, though the rest of the

(*a*) But see the remarks of Jervis, C. J., upon this case, in giving judgment in Ralli *v.* Janson, 6 Ellis & B. 436, 437 (E. C. L. R. vol. 88).

cargo may come to hand only partially damaged, and the whole may have consisted of articles warranted free from average."(a) [WILLIAMS, J.—That doctrine is distinctly repudiated by the Exchequer Chamber, in Ralli v. Janson: see 6 Ellis & B. 441 (E. C. L. R. vol. 88).] Be that as it may, the present case steers clear of the doctrine for the first time laid down in Ralli v. Janson. This is an insurance, not upon goods of a like species, but upon "master's effects," which must necessarily be of various kinds,—the general term being employed to describe them, in order to avoid unnecessary prolixity in enumerating the several articles in detail. Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court:—

*28] *This action has been brought on a policy of marine insurance on goods on board the ship Lion, for a voyage from Catania, in Sicily, to any port in the United Kingdom. The goods insured were described in the policy as "master's effects;" and the memorandum as to average was, "free from all average." Some of the goods thus insured were totally lost by the perils insured against, but others were saved.

At the trial, before my Lord Chief Justice, it was contended, on the part of the plaintiff, that he was entitled to recover in respect of the goods which had been lost, as for a total loss of each article. On the part of the defendant, it was answered, that he was exempted by the average memorandum, because the loss was only a partial loss of the subject insured: and it was argued that the present case must be governed by the recent decision of Ralli v. Janson, 6 Ellis & B. 422. The Lord Chief Justice reserved the point, but, in deference to that authority, directed a verdict to be entered for the defendant; giving leave to the plaintiff to move to enter a verdict for 67*l.* 10*s.* damages.

Having heard and considered the argument upon the rule granted in pursuance of that leave, we are of opinion that the present case is distinguishable from Ralli v. Janson, and that the rule to enter the verdict for the plaintiff must be made absolute. In that case, the Exchequer Chamber thought, that, as the insurance was on goods generally, and by the memorandum "seed" was warranted free from average, it was necessary, in the natural construction of the terms of the instrument, to apply the exemption to all linseed on board collectively, whether shipped in bulk or in separate packages, and that the court could not apply the warranty to each bag in which the seed happened to be packed, as a distinct object.

*29] But no such difficulty, we think, occurs in the *present case. The articles which constitute the "master's effects" have no natural or artificial connexion with each other, but, of necessity, must be essentially different in their nature and kind, in their value, in the use to be made of them, and the mode in which they would be disposed on board. The word "effects" is obviously employed to save the task of enumerating the nautical instruments, the chronometer, the clothes, books, furniture, &c., of which they happened to consist. And, although it is stipulated by the warranty that these effects shall be free of all average, —or, in other words, that the insurer shall not be liable for any amount of sea-damage to them short of a total loss,—we think, looking at the nature of the subject of insurance, and the terms of this exemption, it

(a) This passage is expunged from the 2d edition, and the decision in Ralli v. Janson adopted in lieu of it: vide Vol. 2, p. 1058.

is doing no violence to the language used, to hold that he is not to be exempted from liability for a total loss of any of the articles of which the "effects" consist. Suppose, instead of the general description of "master's effects," the body of the policy had enumerated them, and then the memorandum had said, "the chronometer, the sextant, the hat, and the great-coat above mentioned, to be free from average," &c., —might not this be well understood to mean that the insurer was not to be liable for any partial damage, but was to be liable for any total loss of any of the specific things mentioned in the memorandum? And, if so, we do not feel constrained to hold that the intention of the parties is different, and the subject of insurance one indivisible subject, merely because the description in the policy of the articles insured is general, and the memorandum extends to the whole subject of the insurance.

The more strict construction leads to the very harsh and absurd consequence, that, if the assured happens to be successful in rescuing any portion of the articles insured,—even the clothes he may be wearing,—from *the perils of the sea, he will thereby incur the penalty of [*30 forfeiting his insurance on the rest, though they are all totally lost. This result is so startling that we find it impossible to believe the parties could have intended it. And it may be added, that the contract, so construed, would be quite at variance with the object for which, as it is well known, the memorandum as to average was introduced into policies, viz. that, since it may be difficult to ascertain the true cause of the damage which goods of certain kinds, such as those usually specified in the memorandum, receive in the course of a voyage,—whether it arose from the nature of the articles themselves, or from the perils insured against,—the insurers thereby expressly provide, that, as to some kinds of goods, they will not be answerable for any average or partial loss, and, as to others, that they will not be liable for such loss not amounting to a certain per-centage on the goods. Rule absolute.(*a*)

(*a*) See the next case.

WILKINSON *v.* HYDE.

An insurance was effected for "240*l.*, on *goods* so valued, *against total loss only*." The policy contained the usual memorandum against particular average under 3 or 5 per cent. The goods thus insured consisted of property of various descriptions in separate cases and packages, some of which were by a peril insured against totally lost, and others saved:— Held, on the authority of Duff *v.* Mackenzie, ante, p. 16,—that the assured was entitled to recover in respect of the packages so totally lost.

THIS was an action upon a policy of insurance.

The declaration stated that F. G. Goodliffe and A. Smart, as agents for the plaintiff, on the 21st of September, 1855, according to the usage and custom of merchants, caused to be made a certain policy of insurance purporting thereby and containing therein that *the said F. G. Goodliffe and A. Smart, as well in their own name [*31 as for and in the name and names of all and every other person or persons to whom the same did, might, or should appertain in part or in all, did make assurance and cause themselves and them and every of them to be insured, lost or not lost, at and from London to Natal, includ-

ing risk of craft to and from the ship, &c., upon any kind of goods and merchandises, and also upon the body, tackle, &c., and other furniture of and in the good ship or vessel called the Annabella, &c., beginning the adventure upon the said goods and merchandises from the loading thereof aboard the said ship as above, upon the said ship, &c., and so should continue and endure during her abode there, upon the said ship, &c., and further, until the said ship with all her ordnance, tackle, &c., and goods and merchandises whatsoever, should be arrived at as above, upon the said ship, &c., until she had moored at anchor twenty-four hours in good safety, and upon the goods and merchandises until the same should be there discharged and safely landed: and it should be lawful for the said ship, &c., in that voyage to proceed and sail to and touch and stay at any ports or places whatsoever without prejudice to that insurance: the said ship, &c., goods and merchandises, &c., for so much as concerned the assured, by agreement between the assured and assurers in that policy, were and should be valued at 240*l.* *on goods so valued, against total loss only:* touching the adventures and perils which they the assurers were contented to bear and did take upon them on that voyage, they were of the seas, &c., &c.: and it was agreed by them the assurers that that writing or policy of assurance should be of as much force and effect as the surest writing or policy of assurance theretofore made in Lombard street, or in the Royal Exchange, or elsewhere in
*32] London: and so they the assurers were *contented and did thereby promise and bind themselves, each one for his own part, their heirs, executors, and goods, to the assured, their executors, administrators, and assigns, for the true performance of the promises, confessing themselves paid the consideration due unto them for that assurance by the assured, at and after the rate of 60*s.* per cent.: And by a certain memorandum thereunder written, corn, fish, salt, fruit, flower, and seed were warranted free from average, unless general, or the ship should be stranded; sugar, tobacco, hemp, flax, hides, and skins were warranted free from average under 5*l.* per cent.; and all other goods, also the ship and freight, were warranted free from average under 3*l.* per cent., unless general, or the ship should be stranded: Averment, that the said policy of insurance and memorandum were so made by Goodliffe and Smart as the plaintiff's agents, and for his use and benefit,—of which the defendant, afterwards, to wit, on, &c., had notice; and thereupon, in consideration that the plaintiff, at the request of the defendant, had then paid to the plaintiff a certain sum of money, to wit, a sum after the rate aforesaid, as a premium or reward for the insurance of 120*l.* of and upon the said goods in the said ship or vessel in the said voyage in the said policy of insurance mentioned, and had then promised the defendant to perform and fulfil all things in the said policy of insurance contained on the part and behalf of the insured to be performed and fulfilled, the defendant then promised the plaintiff that he the defendant would become and be an insurer to the plaintiff of the said sum of 120*l.* upon the said goods in the said ship or vessel in the said voyage in the said policy of insurance mentioned, and would perform and fulfil all things in the said policy of insurance mentioned on his part and behalf as such insurer of the said sum of 120*l.* to be performed and fulfilled;
*33] and the defendant then *became and was an insurer to the plaintiff, and then duly subscribed the said policy of insurance as

such insurer of the said sum of 120*l.*, upon the said goods in the said ship or vessel in the said voyage: *That divers goods of different kinds and descriptions, and in separate cases and packages, were shipped by the plaintiff* in and on board of the said ship or vessel in the said policy of insurance mentioned, to be carried and conveyed therein on the said voyage, which goods were of the kinds and descriptions, and in the cases and packages following, that is to say, one case marked A W 26, containing one wagon, four wheels, and three packages of fittings for the wagon,—one other case marked A W 27, containing one tent,—three other cases marked A W 28, 29, 30, containing clothes and wearing apparel,—*one other case marked A W* 31, *containing circular saws*,—seven other cases marked A W 32, 33, 34, 35, 36, 37, 38, containing tools and metal castings,—one other case marked A W 39, containing an iron anvil,—one other case marked A W 40, containing an iron vice,—one other case marked A W 41, containing two pieces of steel,—one other case marked A W 42, containing iron agricultural implements,—one other case marked A W 43, containing a cart wheel,—one other case marked A W 44, containing a package of iron,—one other case marked A W 45, containing iron rods,—one other case marked A W 46, containing an iron axle,—one other case marked A W 47, containing a harrow bar,—two other cases marked A W 58, 59, containing hardware,—*four other cases marked A W* 80, 81, 82, 83, *containing window sheet-glass*,—ten kegs marked A W 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, containing nails,—one bundle marked A W 60, containing spades, shovels, and crowbars,—nineteen other bundles marked A W 61 to 79, containing iron-wire,—also five bars of iron and seven bundles of iron: That the plaintiff, at the time of the *shipping of the said goods, and from thence until the time of the loss thereinafter mentioned, was [*34 interested in the said goods in the said policy of insurance mentioned, and so shipped on board the said ship as aforesaid, to a large value and amount, to wit, the value and amount of all the moneys by him ever insured or caused to be insured thereon: That the said ship or vessel with the said goods on board thereof afterwards departed and set sail from London aforesaid on her said voyage towards Natal aforesaid, and that afterwards, and whilst the said ship or vessel was proceeding on her said voyage, and before her arrival at Natal aforesaid, and during the continuance of the risk insured by the said policy, all the said goods *except the said case of circular saws*, marked A W 31, *and except two of the said cases of window sheet-glass*, were totally lost by the perils of the seas, and never did arrive at Natal aforesaid: And that each of the said cases and packages with goods therein was of great value, and that the value of the goods so totally lost amounted to a large sum of money, to wit, 233*l.* 16*s.* 9*d.*, and that the value of the said case of iron saws that was not lost was a small sum, to wit, 10*l.* 14*s.* 1*d.*, and the value of the said two cases of window sheet-glass that were not lost was a small sum, to wit, 3*l.* 1*s.* 6*d.*, and thereupon a large sum of money, to wit, 113*l.* 3*s.*, became and was due and payable by the defendant to the plaintiff under and by virtue of the said policy,—of all which the defendant had due notice, and was requested by the plaintiff to pay him the said sum in respect of the said goods so wholly lost as aforesaid, and which sum the defendant then ought to have paid according to the form and effect of the said policy of insurance and his said promise and

undertaking so by him made as aforesaid: Yet that the defendant had disregarded his said promise, and had not paid the same, or any part *35] thereof: and the *plaintiff averred that he had duly performed all conditions precedent to entitle him to support this action: and he claimed 150*l.*

The defendant pleaded,—thirdly, that the policy was made upon goods against total loss only, and at the time of making of the policy, the plaintiff and his agents knew, and the defendant did not know, that the goods which were to be the subject-matter of the policy were of different kinds and descriptions, and to be packed in separate cases and packages, and that, in consequence thereof, the defendant might under the policy be called upon to indemnify the plaintiff for a total loss of part of the goods, not being a total loss of the whole; and that this was a material fact affecting the rate of premium, and the nature of the risk, and that it was concealed from him.

Second replication to the third plea,—that the said insurance was proposed by the plaintiff to the defendant on goods against total loss only, as mentioned in the policy, and not otherwise, and that no inquiry was ever made by the defendant of the plaintiff as to whether the goods were to be all of the same or different kinds or descriptions, or to be packed in separate cases or packages; and that the plaintiff did not communicate to the defendant that he intended to ship goods of different kinds and descriptions, and to be packed in separate cases and packages, because he believed that the defendant well knew, that, under the terms of the policy, the plaintiff might ship goods of different kinds and descriptions, and packed in separate cases and packages; and that this was the true meaning and effect of the policy; and that the defendant reasonably might and could and ought to have known that it was the true intent and meaning of the policy that the plaintiff might ship goods of different kinds and descriptions, and packed in separate cases and *36] packages, and that *the plaintiff did not know that the fact stated in the plea was a material fact affecting the rate of premium and the nature of the risk.

The plaintiff also demurred to the third plea, on the ground "that it was not material or necessary to have informed the defendant that the goods were of different kinds and descriptions, and packed in separate cases and packages, in order to give validity to the policy." Joinder.

The defendant demurred to the second replication to the third plea, assigning for cause "that it was immaterial that the defendant made no inquiries as to the fact concealed." Joinder.

Bovill, Q. C. (with whom was *Mellish*), in support of the demurrer.(*a*)—This case must be governed by Duff *v.* Mackenzie, ante, p. 16. The policy is "on goods," valued at 240*l.*, and is against "total loss only," with the ordinary memorandum of warranty against average under five and three per cent. [WILLIAMS, J.—The special words "against total loss only," render the memorandum useless.] The memorandum may

(*a*) The points marked for argument on the part of the plaintiff, were,—

"That he is entitled to recover the value of the packages totally lost; that it was not necessary to have informed the defendant that the goods were of different kinds and descriptions, and packed in separate cases and packages; that the defendant ought to have known that the true intent and meaning of the policy was, that the plaintiff might ship goods of different kinds and descriptions, and packed in separate cases and packages; and that there was no concealment of a material fact."

serve to show the sense in which the word "goods" is used. Under this policy the plaintiff shipped a number of cases and packages of miscellaneous goods, apparently the equipment of an emigrant. The vessel was wrecked, *and all the goods lost, with the exception of a case of [*37 circular saws and a case of window sheet-glass: and the question is, whether that is a total loss of the packages which were actually lost, or an average loss only. By the contract, the assured was not precluded from shipping goods of any description he pleased; nor was he bound to disclose of what the several packages consisted. Upon the authority of Duff *v.* Mackenzie, the plaintiff is clearly entitled to recover as for a total loss the value of the packages which were lost; and the case is wholly unaffected by Ralli *v.* Janson, 6 Ellis & B. 422 (E. C. L. R. vol. 88).

Blackburn, contrà.(*a*)—Duff *v.* Mackenzie proceeded upon a distinction which is wholly inapplicable here. This is an insurance against total loss only,—that is, a total loss of the subject-matter of insurance. The assured, in the event of a total loss, was to receive 240*l.*, all or nothing. It is impossible to conceive a mode of expressing that meaning more clearly than that here adopted. In Duff *v.* Mackenzie, the court suggest that the word "effects" was obviously employed to save the task of enumerating the nautical instruments, the chronometer, the clothes, books, furniture, &c., of which they happened to consist. "Suppose," they say, *"instead of the general description of [*38 'master's effects,' the body of the policy had enumerated them, and then the memorandum had said, 'The chronometer, the sextant, the hat, and the great-coat above mentioned, to be free from average,' &c.,—might not this be well understood to mean that the insurer was not to be liable for any partial damage, but was to be liable for any total loss of any of the specific things mentioned in the memorandum? And, if so, we do not feel constrained to hold that the intention of the parties is different, and the subject of insurance one indivisible subject, merely because the description in the policy of the articles insured is general, and the memorandum extends to the whole subject of the insurance." [WILLIAMS, J.—Would the judgment have been different in that case, if the insurance had been upon "effects" merely?] It would have been bad if it had not. Ralli *v.* Janson in reality decides this case. Indeed all the authorities on the subject are one way, with the exception of Davy *v.* Milford, 15 East 559, which must now be considered as overruled. According to the doctrine there laid down, if part of the goods insured had been corn and part iron, the memorandum would have applied to the former, and not to the latter: if the whole of the corn had been lost, the assured would have been entitled to recover, though the iron were not lost. Wherever the right to abandon exists, it must

(*a*) The points marked for argument on the part of the defendant, were,—

"1. That, the policy being on goods against total loss only, and it being admitted on the count that the total of the goods were not lost, there is no cause of action disclosed, and the defendant is entitled to judgment on the whole record, whether the plea or the replication be or be not good:

"2. That, if the insured could by packing his goods in a particular manner increase the risk of the underwriters, he ought not to have concealed, that, at the time of the insurance, he intended so to pack them; and that the plea is good:

"3. That the replication is not sufficient, the insured being bound to disclose all material facts in his knowledge, without inquiry."

be of the entire subject-matter of insurance. Emérigon, Vol. II. c. 17, § 8, p. 248, says: "Le Guidon de la Mer, Ch. 7, art. 7, 8, et 9, distingue le cas où l'on a fait assurer *diverses espèces ou sortes de marchandises*, d'avec le cas où l'assurance porte sur le même genre de marchandises, telles que fruits, sel, grains, victuailles, ou autre provisions. Dans le premier cas, si l'une des marchandises était perdue ou avariée audelà de la moitié, on pouvait en faire délaissement aux assureurs, et retenir l'autre. Dans le *second cas, où il s'agit d'un même genre de marchandises, *l'assuré* (est-il dit) *ne pourra faire délais de ce qui est gâté, et retenir ce qui est sain; mais faudra qu'il fasse délais de tout l'espèce.* Notre Ordonnance, en l'art. 47, a établi une règle plus simple. *On ne pourra*, dit-elle, *faire délaissement d'une partie et retenir l'autre.* Car, comme l'observe M. Valin, ibid., le contrat d'assurance, étant *individu*, ne peut souffri aucune division. Mais, quelque simple que cette règle paraisse, elle a besoin de quelque interprétation. 1. Je me fais indéfiniment assurer 10,000 liv. sur *facultés* ou sur *telles et telles marchandises*, chargées dans un tel navire, sans rien distinguer; cette assurance est une: unica assecuratio omnium mercium. Je ne puis délaisser mes sucres, et retenir mes indigos. De Luca, de Credito, disc. 108, No. 11; Casaregis, disc. 1, No. 110; Valin, dicto loco; Pothier, No. 131. 2. Si par une police, je fais assurer mes sucres, et par une autre mes indigos; ou si, par la même police, je fais assurer distinctement et séparément telle somme sur mes sucres, et telle autre somme sur mes indigos, je pourrai, le cas échéant, retenir l'un de ces objects et délaisser l'autre, parceque ce sont deux assurances distinctes l'une de l'autre: duæ assecurationes: De Luca et Casaregis, d. locis; Valin, art. 47; Pothier, n. 132. Le sieur Peyronet, de Bordeaux, armateur du navire le Saint-Marc, s'était fait assurer par une même police, 24,000 liv., savoir, 6000 liv. *sur le corp, et le reste sur les facultés.* Dans le cours du voyage, le navire fut déclaré innavigable. L'assuré aurait pu, suivant la jurisprudence alors en vigueur, faire abandon du corps et des facultés; mais comme les facultés et le corps avaient été distingués dans la police, il se borna a présenter requête *en abandon du corps, et en paiement des 6000 liv. assurées sur icelui.* Les assureurs contestaient cette requête, soutenant que l'assuré aurait dû abandonner également la cargaison. Cette *exception fut rejettée; et par sentence de notre amirauté, rendue le 16 mars, 1752, les assureurs furent condamnés à payer le somme demandée. 3. Si je fait assurer une somme confusément et sans distinction *sur corps et facultés*, et que le navire fasse naufrage, je ne puis retenir, en tout ni en partie, les marchandises sauvés, et délaisser le corps naufragé." [WILLIAMS, J.—The view which you take goes to show that the decision in Duff *v.* Mackenzie was wrong; which we cannot admit. WILLES, J.—There are many rules as to abandonment in the French law, which are not received here.] In Arnould on Insurance, 2d edit. Vol. 2, pp. 1158—1160, it is said: "Where a gross sum is insured in a single policy upon a general class comprising several particular subjects, without specifying on which, or to what amount on each,—the insurance is one and entire, and the abandonment, consequently, must extend to the whole class. Thus, if 1000*l.* be insured 'on goods' generally, and the goods in fact consist partly of sugars and partly of indigoes, the assured cannot, in case of wreck, or other con-

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structive total loss, abandon his sugars, and retain his indigoes, or vice versâ.(*a*) If, however, a specific and distinct sum be insured on each kind of commodities,—as '1000*l.* on the sugars, and 1000*l.* on the indigoes,'—in such case, either of these two subjects may be separately abandoned. It has been said by a high authority in the law of marine insurance, that, if the several kinds of commodities are each separately *valued* in the policy, they may each be separately abandoned, even though a specific and distinct sum may not be insured upon each: Marshall on Insurance 612. *Accordingly, in the United States, where *one gross sum* was insured 'on 150 boxes of sugars, valued at 6000*l.*, 5 hampers of [*41 mace, valued at 5000*l.*, and 4 tons of logwood, valued at 250*l.*,' it was held, that, under such a policy, the assured might abandon each article separately.(*b*) This rule is doubted by Mr. Phillips, who contends that the *insurance* in such case is one and entire, though the *valuation* is distinct, and that, consequently, the abandonment ought to be entire also.(*c*) In this country, however, there seems little doubt that the rule as laid down by Mr. Marshall is that to be acted upon, especially in cases where perishable commodities are shipped in separate packages; when, as we have seen, the insurance is in practice taken to be distinct on each species, even without a special clause to that effect.(*d*) Chancellor Kent, after noticing the doubt raised by Mr. Phillips, thus cautiously lays down the rule,—Comm. Vol. 3, p. 329, edit. 1844,—'Unless the different sorts of cargo be so distinctly separated and considered in the policy as to make it analogous to distinct insurances on distinct parcels, there cannot be a separate abandonment of part of the cargo insured.'" In Humphreys *v.* The Union Insurance Company, 3 Mason, U. S. 429, 440, the insurance was on "cargo," with the usual memorandum exempting the underwriter from particular average on "salt, fish, *fruit*, grain," &c. The shipment consisted of a certain number of boxes of lemons and oranges: the whole of the latter were lost, but a portion of the former were saved; and it was held, that the underwriters were not liable as for a total loss of the oranges. Mr. Justice Story says: "The *fifth [*42 and last point is, whether the plaintiff is entitled to recover for a total loss of the oranges. The argument is, that the memorandum is not designed to exclude losses where there is a total destruction of any specific separated portion, as, a box, hogshead, or bale of the memorandum articles; and, à fortiori, not where there is a total destruction of the whole of any single memorandum article. The present insurance is upon *cargo* generally, and the memorandum in express terms exempts the underwriter from particular averages or partial losses on 'salt, fish, *fruit*, grain,' &c. &c. The memorandum does not designate *oranges* particularly by name, but they are comprehended merely because they fall under the general description of '*fruit*.' In the present case, there were 1100 boxes of lemons, and 299 boxes of oranges on board. Of

(*a*) Emérigon, Ch. xvii., § 8, Vol. 2, p. 249, edit. 1827. So decided in the United States, in case of a general insurance on a cargo consisting of beef, butter, soap, candles, apples, and potatoes. Guerlain *v.* Columbian Insurance Company, 7 Johns. 527; cited Phillips on Insurance, Vol. 2, p. 359, 3d edit.

(*b*) Diedericks *v.* The Commercial Insurance Company of New York, 10 Johns. 234.

(*c*) Phil. Ins., Vol. 2, p. 370. He adheres to his opinion in the 3d edit., pp. 360, 361.

(*d*) See Stevens on Average, 237, 5th edit. But see Ralli *v.* Janson, 6 Ellis & B. 422 (E. C. L. R. vol. 88).

the lemons, 806 boxes were saved; and supposing there was, upon the facts stated by the auditors,(a) a total loss of the oranges, still there is no pretence to say that the whole of the memorandum article '*fruit*' was lost. The argument, therefore, if it is to stand at all, must stand upon the ground that the loss of the whole of any one article falling under the description of 'fruit' in the memorandum, is a loss for which the underwriters are liable. It is not distinguishable in principle from the case of the loss of a whole hogshead of sugar, in policies where sugar is warranted free from particular average.(b) The case of Dyson *v.* Rowcroft, 3 B. & P. 474, seems to me to be perfectly correct in principle, but it turned altogether *upon different principles. The insurance *43] was on fruit; and, in the course of the voyage, the fruit was so much damaged by the perils of the seas that it was rotten, and was necessarily thrown overboard at an intermediate port, into which the ship was driven. The loss was completely total by the destruction of the fruit before it arrived at the port of destination. That case applies to the present no further than it has a tendency to prove that there was in contemplation of law a total loss of the oranges by the events of the voyage. That point has not been much contested at the argument, and may be passed over without further observation." And, observing upon Davy *v.* Milford, 15 East 559, this distinguished jurist says: "The insurance in Davy *v.* Milford was not on each parcel of flax separately, but on the aggregate as a totality. The memorandum warrants the underwriter free of particular average *on the thing insured.* It binds him only to a total loss of the *thing insured.* It seems to me that the error of the reasoning is, in considering the insurance as a separate insurance on each distinct parcel, and not as an insurance on the aggregate. This is a departure from the policy." If that be good law, how can the several packages here insured under the general description of "goods" valued at a given sum, be taken divisim? In Brooke *v.* The Louisiana State Insurance Company, 4 Martin, N. S. 640, 681, 5 Martin, N. S. 530 (cited, 2 Phillips on Insurance, 3d edit. 642), mules were insured from St. Iago, in Mexico, to the island of Cuba, "against stranding and total loss:" the assured claimed for a loss of part of the mules by perils of the sea, the remainder having arrived; and the court were, upon the first argument of the case, in favour of the claim, but, on a rehearing before the same and another judge, the decision was the other way. Matthews, J., on the last occasion, says,—5 Martin 546,—"The clear *evident, and ordinary meaning of the written clause in the policy, *44] on which the present suit is founded, according to just grammatical and legal construction, limits the liability of the defendants to indemnify for such loss only as amounts to an entire physical destruction of the whole cargo, or perhaps a total loss as to the value." [WILLES, J.—This is all perfectly reconcilable with the judgment of the Exchequer Chamber in Ralli *v.* Janson.] Assuming that the court are against me as to the construction of the policy, if, at the time of making the policy, the assured had in his own mind determined what the subject-

(a) To whom it had been referred to report and state the loss,—a proceeding equivalent to a reference to an arbitrator to state a case for the opinion of the court upon questions of law.

(b) See Lewis *v.* Rucker, 2 Burr. 1167: and see Hedburg *v.* Pearson, 7 Taunt. 154 (E. C. L. R. vol. 2), 2 Marsh. 432 (E. C. L. R. vol. 4); and the judgment in Ralli *v.* Janson, 6 Ellis & B. 432, 433 (E. C. L. R. vol. 88).

matter of the insurance should consist of, it was his duty to communicate it to the underwriters: Middlewood *v.* Blakes, 7 T. R. 162. And, if the plea be good, the replication clearly affords no answer to it.

Bovill, in reply, was stopped by the court.

WILLIAMS, J.—Notwithstanding the learned argument of Mr. *Blackburn*, I am of opinion that it is impossible to distinguish this case from Duff *v.* Mackenzie, antè, p. 16. If the defendants are dissatisfied with the law as laid down in that case, they must have recourse to the Exchequer Chamber, where it will be set right, if wrongly expounded by us. Applying the doctrine of that case here, as soon as it is ascertained that the goods are of different species, it is as if the different species had been enumerated. The words "against total loss only" cannot mean "total loss of the whole subject of insurance," taken collectively, as Mr. *Blackburn* contends. The object is simply to get rid of the common average memorandum,—to exempt the underwriters from responsibility except in respect of a total loss of the subject-matters of insurance each taken separately. I see no more reason why the different sorts of "goods" *should be enumerated, than that "master's effects" should be separately described. The underwriter who insures "goods" has [*45 no right to expect that they shall be all of one species. I cannot entertain a shade of doubt that the plaintiff is entitled to recover.

WILLES, J.—I am of the same opinion. I am unable to distinguish this case from Duff *v.* Mackenzie. The material words of the policy are,—"240*l.*, on *goods* so valued, *against total loss only*." The only effect of these latter words is, to strike out the usual memorandum: the goods are warranted against general average. It is now established by Ralli *v.* Janson, that, if the goods are all of one species, the warranty against particular average extends to the whole subject of insurance, though it may be contained in different packages. But the court carefully abstained from saying what would have been the case if the goods had been of different kinds. It was proper to exclude that, because it appeared from the cases cited from the American courts that the assured was held to have no claim on account either of a partial destruction of the value of the article, or a destruction of a part of the article, whether it be shipped in bulk or in separate packages, unless the policy indicate that a loss is to be adjusted on each package; in other words, unless each package is separately valued and insured,—see Humphreys *v.* The Union Insurance Company, 3 Mason 429,—though it is now held the other way in America: see Brooke *v.* The Louisiana Insurance Company, 4 Martin, N. S. 640, 681, and 5 Martin, N. S. 530. In Humphreys *v.* The Union Insurance Company, the goods were all of one species, viz. fruit: part of the cargo, consisting of oranges, was totally lost; the residue, consisting of lemons, was saved: and it was held that the warranty against particular average on "fruit" exonerated the *underwriters. In Brooke *v.* The Louisiana Insurance Company, the [*46 subject-matter of insurance was a number of mules, and the insurance was against *total loss* only; and it was ultimately held that nothing short of a physical total loss of the whole number insured would render the assurers responsible. That is in accordance with the judgment of the Exchequer Chamber in Ralli *v.* Janson, and goes to the same extent, no further. With regard to the passage cited from Emérigon, it is impossible to apply the reasoning of the French law as to abandonment to a

totally different branch of the law of insurance in England. In Duff *v.* Mackenzie, the insurance was upon "master's effects," free from all average; and some of the articles comprised in that general term having been saved, the assured was held entitled to recover the value of others which were totally lost,—on the ground that a person insuring "master's effects" must be assumed to know that the things so described must consist of articles of various kinds and descriptions. Mr. *Blackburn* has very ingeniously attempted to argue that there is a distinction between an insurance on "master's effects," and on "goods" generally. But I think it is too subtle a distinction to be adopted into our mercantile law. The meaning of the words here used is,—"I agree to insure (to the extent stipulated) any cargo you may choose to put on board." Both parties must be assumed to know that "cargo" may consist of goods of different species. It seems to me that that brings the present case technically as well as substantially within the decision in Duff *v.* Mackenzie, to which I am disposed to adhere. If that decision is thought erroneous, the parties must go elsewhere to set it right.

BYLES, J.—I am of the same opinion. Since the case of Davy *v.* Milford, 15 East 559, it seems, that the *expression "total loss" *47] is an ambiguous one; it may mean a total loss of the whole subject-matter of insurance, or a total loss of part. Mr. *Blackburn* here insists that the total loss in this policy means such a loss as shall involve the physical destruction of the entire subject of insurance. Consistently with Duff *v.* Mackenzie, I think it is impossible to hold otherwise than that the declaration in this case is good, and the plea no answer to it. Judgment for the plaintiff.

The general doctrine in the United States is, undoubtedly, that there can be no total loss on a memorandum article so long as any portion thereof remains in specie, and is of some value, after the disaster; and, by parity of reason, in the case of goods warranted free from particular average, under a fixed percentage, a partial loss, whether in *quantity* or in *value*, below that percentage, is not within the policy: Bias *v.* The Chesapeake Insurance Co., 7 Cranch, 415; Marean *v.* Union Insurance Co., 3 Wash. C. C. 256; Depeyster *v.* The Sun Mutual Insurance Co., 17 Barb. 306; American Insurance Co. *v.* Francia, 9 Penn. St. 390; Waln *v.* Thompson, 9 Serg. & Rawle 119; Newlin *v.* Insurance Co. of North America, 20 Penn. St. 312. Therefore, in Newlin *v.* Insurance Co., ut supra, where an insurance was effected on "goods valued as per endorsement on policy;" on which the following endorsement was afterwards made, "April 5, 1850, Schooner Julia Eliza—Savannah to Philadelphia—on deck 104 bales (of cotton), valued at $50 per bale—$5200—1½—$78," and the policy provided that "no loss or average should be paid under 5 per cent.," &c. During the voyage *four* of the bales were washed overboard. It was held that there was not a total loss on each bale, but only an average loss on the whole, and that the insured could not recover. See Mobile Insurance Co. *v.* McMillan, 27 Ala. 77.

SOPHIA GOMM, Demandant; JOHN PARROTT, Tenant. *July* 4.

Inspection, under the 14 & 15 Vict. c. 99, s. 6, can only be had in a case where a discovery could have been obtained by filing a bill in equity.

A demandant in dower is not entitled to inspection of the deed under which the property out of which she claims to be endowed was conveyed away by her husband, as against a bonâ fide purchaser for value, without notice of the marriage,—the balance of authorities being assumed to be in favour of the position that a bill for discovery could not be sustained in such a case.

THIS was an action brought to recover dower to which the demandant claimed to be entitled out of certain woodland called The Ouve Wood and Tatnals, in the parishes of Buckland and Aston Clinton, in the county of Buckingham, as the widow of the late James Gomm, deceased, her late husband,—her claim arising under the purchase deed and conveyance to her said late husband.

Lush, in Trinity Term last, obtained a rule on behalf of the demandant, calling upon the tenant to show cause why the demandant or her attorney should not be at liberty to inspect and take extracts from a certain deed of conveyance by way of mortgage from one James Gomm, of the lands in respect of which the dower was claimed in this action, being the deed of conveyance first mentioned in the affidavit of the tenant, hereinafter mentioned. The affidavits upon which the rule [*48 *was founded, were those of the demandant and of the tenant, which had already been used at Chambers upon a similar application. The affidavit of the former stated that she had been informed and believed that the tenant had become the purchaser of the said two woods, or one of them, and on such purchase the deed of conveyance to her said late husband was delivered to, and was then in the possession of, the tenant; and that she was advised that it was material and necessary that her attorney should have an inspection of, and, if necessary, take extracts from such conveyance, as also of the subsequent deeds of conveyance relating to the said two pieces of woodland; and that she could not safely proceed to trial without such inspection.

The other affidavit stated, that the hereditaments and premises mentioned or referred to in the pleadings in this cause, were, as the deponent believed, about thirty-five years ago conveyed to or in trust for one James Gomm; that the same hereditaments and premises were a few days subsequently to such purchase conveyed by the said James Gomm and another to certain persons, to secure the repayment of a certain sum of money then advanced and lent by them to the said James Gomm, to enable him to pay the purchase-money for the same hereditaments and premises, and, in default of repayment of the same by the said James Gomm to the said trustees of the principal money and interest, upon trust for sale of the same hereditaments by the said mortgagees; that the deponent was informed and believed that default was made in repayment of the money so advanced, and that the said trustees, with the concurrence of the said James Gomm, shortly after such mortgage, *sold and conveyed the same to a bonâ fide purchaser for the valuable consideration in such deed mentioned*, the said James Gomm being a party to and executing the conveyance, and entering into the usual *cove- [*49 nant against encumbrances; that the trustees under the will of such last purchaser again sold the same hereditaments and premises for

a valuable consideration, and such hereditaments and premises were, with the exception next thereinafter mentioned, then absolutely vested in and belonged to the deponent, for and by reason of a valuable consideration, and had been so vested for some years without claim or interruption, save as above mentioned; that *one-half of the field called Tatternolds in the affidavit of the demandant was not the deponent's property, nor had he any interest whatsoever in such half, the fee-simple thereof and therein being vested in another party, who held the same under a similar title to that under which the deponent held the other half;* that the deponent *never had any notice or knowledge that the said James Gomm was ever married, or had left any widow, or that the same hereditaments and premises were subject to dower,* or to any claim for dower, until application was made to him by the demandant's attorney within the last twelve months; and that, in case an order should be made in this case in the terms asked for, he would be *exposing the title of a person not party to the suit,* and might thus prejudice his interest, without his knowledge.

Wigram on Discovery 81, 82, Ovey *v.* Leighton, 2 Sim. & Stu. 234, The Earl of Portarlington *v.* Soulby, 7 Sim. 28, and Williams *v.* Lambe, 3 Bro. C. C. 264, were referred to.

J. B. Maule showed cause.—The short answer to this rule is, that it is calling upon the tenant to expose the title of a third party. Besides, as to a portion of the property, the tenant is a bonâ fide purchaser for value, without notice. All the cases are collected in Sugden's Vendor and Purchaser, 13th edit. 644, where it is said: "The title of a pur-
*50] chaser for valuable consideration *without notice, is a shield to defend the possession of the purchaser,—Patterson *v.* Slaughter, Ambl. 292,—not a sword to attack the possession of others,—Strode *v.* Blackburne, 3 Ves. 225. It is clear that it will protect his possession from an equitable title, although even that has been sometimes questioned,—Medlicott *v.* O'Donel, 1 Ball. & B. 171: and it now seems to be settled that it will avail against a legal title. In Burlace *v.* Cooke, 2 Freem. 24, Lord Nottingham held the plea to be good against a legal estate; but, in the subsequent case of Rogers *v.* Seale, 2 Freem. 84, he is reported to have been of a different opinion, and to have decreed accordingly. But both these cases appear to be very ill reported. In Parker *v.* Blythmore, 2 Eq. Ca. Abr. 79, Prec. in Ch. 58, the Master of the Rolls thought the plea good against a legal estate. But, in Williams *v.* Lambe, 3 Bro. C. C 264, upon a bill filed by a dowress against a bonâ fide purchaser, without notice of the marriage, Lord Thurlow overruled the plea. He said that the only question was, whether a plea of purchase without notice would lie against a bill to set out dower; that he thought, where the party is pursuing a *legal title,* as dower is, the plea did not apply, it being only a bar to an *equitable,* not a *legal* claim. In a later case,—Jerrard *v.* Saunders, 2 Ves. jun. 454,—Lord Rosslyn considered it impossible that Rogers *v.* Seale could be the decision of Lord Nottingham, and decreed that the plea could stand against a legal as well as an equitable title." The judgment of Lord Rosslyn in that case fully sustains the principle now contended for.(*a*)

*51] *Lush,* in support of his rule.—That which the *demandant seeks to have an inspection of, is the deed by which her husband first

(*a*) And see Spence's Equitable Jurisdiction of the Court of Chancery, Vol. 2, p. 733, and note (c).

conveyed away the property out of which she claims dower. Williams *v.* Lambe, 3 B. C. C. 264, was the case of a bill for dower, stating that the plaintiff was lawfully married to William Williams, and continued his wife to the time of his death; that William Williams, being seised of lands, &c., during the coverture, in February, 1783, sold the same to the defendant, who entered into possession of the same; and that Williams died in May, 1786, leaving the plaintiff his widow: the bill therefore prayed a discovery of the lands, and that the defendant might assign to her one-third part as her dower. The defendant pleaded to the discovery and relief, that he was a purchaser of the estate (subject to a mortgage), for valuable consideration, without notice of the vendor being married: and the plea was overruled,—the Lord Chancellor saying "that he thought, where the party is pursuing a legal title, as dower is, that plea does not apply, it being only a bar to an equitable, not to a legal claim." The note to that case by Mr. Belt points out the distinction, which it is submitted is a sound one, between it and Jerrard *v.* Saunders:—"Notwithstanding what is said to the contrary, in Bassett *v.* Nosworthy, Finch 102, approved, as it seems to be, by Lord Loughborough, C., 2 Ves. jun. 457, 458, and notwithstanding what is said by Mr. Sugden at the conclusion of his work on Vendors and Purchasers, pp. 667, 668 (5th edit.), so much respect is due to Lord Thurlow's judgment *in marking the distinction within stated*, that the editor questions whether the point has been sufficiently considered. The editor, in particular, much questions *whether Lord Loughborough was aware of the present determination, when he threw out the general propositions above adverted to in this note.* (2 Ves. jun. 458.) Mr. Beames, who is eminently versed in the doctrine of pleas, both at law *and in equity, [*52 *distinctly treats Lord Thurlow's decision here as unimpeachable*, notwithstanding he had a few pages before quoted the dicta to the contrary in Bassett *v.* Nosworthy (vide Elem. Pl. 245, 234); and it is very satisfactory to the editor to find his own sentiments corroborated by the observations of Mr. Roper, contained in his modern treatise on the law of Baron and Feme, Vol. 1, 446, 447, 2d edit., p. 451. That gentleman, speaking of the principal case, says,—'*This decision, though quarrelled with, is, as it would seem, sound and proper;* for, when it is admitted that *dower is a mere legal right*, and that a court of equity, in assuming a concurrent jurisdiction with courts of law, *professedly acts upon the legal right*, that court, in *analogy to law, where such a plea would not be looked at*, decides that in this instance *the same equitable plea is also inadmissible.* This analogy, it is obvious, does not hold where the widow applies for *equitable* relief, as the removal of terms, &c. In such cases, the equitable plea of being a purchaser for value without notice, cannot, as it would seem, be resisted. *In the first case, the widow*, proceeding upon the concurrent jurisdiction of the court, *merely enforces a right which the defendant cannot at law resist by such a mode of defence:* in the second case, *she applies to the equity of the court to take away from him a defence which at law would protect him against her demand.*' The editor has also to observe that Lord Redesdale, in the last edition (3d) of his treatise (p. 38), does not question the decision in the principal case; with regard to which the profession should also be referred to 1 Ball & B. 171," Medlicott *v.* O'Donel. Here, the plaintiff is asserting a strictly *legal* right. In

Curtis *v.* Curtis, 2 Bro. C. C. 620, which was the case of a bill filed by a widow, against the heir of her husband, for dower, the Master *53] *of the Rolls says: "Generally there are no damages in real actions, but, so favourable was the law to this particular action, that it provided a special relief for the widow, by giving her damages." And at the conclusion of his judgment, he adds: "*I agree most fully in thinking that the widow labours under so many disadvantages at law from the embarrassments of trust-terms, &c., that she is fully entitled to every assistance that this court can give her, not only in paving the way for her to establish her right at law, but also by giving complete relief when the right is ascertained.*" That was followed by Williams *v.* Lambe, which has never been overruled. Jerrard *v.* Saunders, 2 Ves. jun. 454, was not a case of dower. Every purchaser must know that the estate is liable to that sort of encumbrance: he is bound to inquire into the fact of marriage, and therefore cannot be said to be a purchaser without notice. Sir James Wigram, in his treatise on Discovery, 2d edit. p. 81, enumerating the exceptions to the cases in which a plaintiff in equity was entitled to exact from the defendant a discovery as to matters material to his case, says,—"So, formerly, if the defendant were a purchaser without notice of the plaintiff's claim." "But," he adds, "later decisions seem to consider a purchaser for value without notice, as not entitled to any greater privilege than a party having any other ground of defence."(*a*) That learned author does not put it on the ground of the peculiar nature of the action of dower. In Medlicott *v.* O'Donel, 1 Ball & B. 171, adverting to an argument which had been urged at the bar, that the plea of purchase without notice did not apply to the case of an equitable estate, Lord Chancellor Manners says,—"I have always *54] thought, that he who had the *best right to call for the legal estate, is entitled to this defence:" and he refers to Williams *v.* Lambe. [WILLIAMS, J.—Was Medlicott *v.* O'Donel cited in Joyce *v.* De Moleyns, 2 Jones & Lat. 374?] It was not.(*b*) The same distinction is taken in Collins *v.* Archer, 1 Russ. & M. 284, where Sir John Leach, M. R., says: "The defendant states by his answer that he is a purchaser for valuable consideration, without notice of the plaintiff's prior charge. Following the case of Williams *v.* Lambe, and the general principle of a court of equity, I am of opinion that that defence is of no avail against the legal title." In Story's Equity Jurisprudence, 6th edit. §§ 630, 631, the learned author, speaking of Williams *v.* Lambe, says: "This decision has been often found fault with, and, in some cases, the doctrine of it denied. It has, however, been vindicated with great apparent force, upon the following reasoning. It is admitted, that

(*a*) Referring to Ovey *v.* Leighton, 2 Sim. & Stu. 234, The Earl of Portarlington *v.* Soulby, 7 Sim. 28, and Sugden's Vendors and Purchasers 304.

(*b*) In Joyce *v.* De Moleyns, it was held by Sir E. Sugden, C., that a purchase for a valuable consideration, without notice, is a defence as well against a *legal* as an *equitable* title. That case is observed upon by Lord Cottenham, C., in Frazer *v.* Jones, 17 Law J., Chan. 353, thus:—"But then comes the question which I should not have had much difficulty about if it had not been for the case of Joyce *v.* De Moleyns, which raises a proposition that I believe is raised for the first time; because the case of Wallwyn *v.* Lee, 9 Ves. 24, which is supposed to have been an authority for it, is very distinguishable: but it raises, undoubtedly, a question, and one that is perhaps extremely difficult to deal with against the authority on which that case was pronounced: at least, it is one that requires careful consideration before I should feel justified in overruling a decision so much considered as the case of Joyce *v.* De Moleyns appears to have been."

dower is a mere legal right; and that a court of equity, in assuming a concurrent jurisdiction with courts of law upon the subject, professedly acts upon the legal right; for, dower does not attach upon *an equitable estate. In so acting, the court should proceed in analogy [*55 to the law, where such a plea, of a purchase for a valuable consideration without notice, would not be looked at; and therefore as an equitable plea it should also be inadmissible. But this analogy will not hold where the widow applies for equitable relief, as, for the removal of terms out of her way, or for a discovery. In the latter cases, the equitable plea of a purchase for a valuable consideration without notice, cannot be resisted. In the former case, the widow, proceeding upon the concurrent jurisdiction of the court, merely enforces a right, which the defendant cannot at law resist by such a mode of defence. In the latter case, she applies to the equity of the court, to take away from him a defence which at law would protect him against her demand." "Other learned minds have, however, arrived at a different conclusion, and have insisted, that, upon principle, the plea of a purchase for a valuable consideration, without notice, is a good plea in all cases, against a legal as well as against an equitable claim; and that dower constitutes no just exception from the doctrine. They put themselves upon the general principle of conscience and equity, upon which such a plea must always stand; that such a purchaser has an equal right to protection and support as any other claimant; and that he has a right to say, that, having bonâ fide and honestly paid his money, no person has a right to require him to discover any facts which shall show any infirmity in his title. The general correctness of the argument cannot be doubted; and the only recognised exception seems to be that of dower, if that can be deemed a fixed exception." And in a note to this passage, it is said: "The authorities are both ways. The case of Williams *v.* Lambe, 3 Bro. C. C. 264, Collins *v.* Archer, 1 Russ. & M. 284, and Rogers *v.* Seale, 2 Freem. 84, are in favour of the doctrine that *the plea is not good against [*56 a legal title. Against it is the decision in Burlace *v.* Cooke, 2 Freem. 24, Parker *v.* Blythmore, 2 Eq. Abr. 79, Prec. in Ch. 58, Jerrard *v.* Saunders, 2 Ves. jun. 454, and Payne *v.* Compton, 2 Y. & C. (Exch.) 457, 461,† Blain *v.* Harrison, 11 Illinois R. 384. Mr. Sugden, in a very late edition (1826) of his work on Vendors and Purchasers, Ch. 18, pp. 762, 763, maintains that the authorities in favour of the sufficiency of the plea against a legal title preponderate; and that, therefore, we may venture to assert that it will protect the purchaser against a legal as well as against an equitable claim. On the other hand, Mr. Beames, Mr. Belt, and Mr. Roper maintain the opposite doctrine: Beames, Pl. Eq. 234, 245; 3 Bro. C. C. 264, n.; 1 Roper on Husband and Wife 446, 447 (2d edit. 451). See also Medlicott *v.* O'Donel, 1 Ball & B. 171; Mitford, Pl. Eq., 274, by Jeremy, and note (*d*); 2 Fonbl. Eq. B. 2, Ch. 6, § 2, note (*b*); 1 Fonbl. Eq. B. 1, Ch. 4, § 25, and note. In a case of such conflict of learned opinions, a commentator's duty is best performed by leaving the authorities for the reader's own judgment. See Park on Dower, Ch. 15, pp. 327, 328, and the reporter's note to 1 Russ. & M. 289." Although there is this conflict of authorities, it is submitted that the demandant is, upon general principles, entitled to a discovery as to the contents of the deed in question, in order to prove her case. [CRESSWELL, J.—The deed of which you to seek to have an

inspection is not part of your title. It is true you want it for the purpose of proving your case: but it is a deed in which you have no interest. Have you any authority for giving discovery of a deed under which the tenant holds?] The deed in question proves that the tenant takes the land in fee from the husband.

*57] CRESSWELL, J.—I think, as the case is one of so much *difficulty that Story declines to decide it, it is incumbent on us to take time to look into the authorities. Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court:—

In this case, the demandant in an action in dower obtained a rule calling on the tenant to show cause why her attorney should not have inspection of, and if necessary take extracts from, a certain deed. The rule was founded on an affidavit made by the demandant, stating that she is advised and believes that her claim to dower arises under the purchase-deed and conveyance to her late husband, and that she has been informed and believes that the tenant has become the purchaser of the property out of which she is suing for dower, and that, on such purchase, the deed of conveyance to her husband was delivered to and is now in possession of the tenant, and that she is advised that it is material and necessary that her attorney should have the inspection, &c.

The tenant has made an affidavit in answer, from which it appears that some years ago he became a purchaser of the lands in question for value, and without notice that they were in any way subject to dower. And it was thereupon contended before us, on showing cause on his behalf, that, inasmuch as previous to the passing of the Common Law Procedure Act, 1854, a discovery could not have been obtained by filing a bill in equity in such a case, no inspection could be compelled under that statute. And the only question is, whether such a discovery could have been so obtained or not.

On referring to the authorities, it appears that this is a point which *58] has been much controverted. In the case *of Williams *v.* Lambe, 3 Bro. C. C. 264, on a bill filed by a dowress, Lord Thurlow overruled a plea of a bonâ fide purchase, without notice of the marriage: and his Lordship said that he thought, where the party is pursuing a legal title, as dower is, that plea does not apply, it being only a bar to an *equitable*, not to a *legal* claim. And the same point was decided by Leach, M. R., in Collins *v.* Archer, 1 Russ. & M. 284; and his Honour said, that, following the case of Williams *v.* Lambe, and the general principle of a court of equity, he was of opinion that the defence was of no avail against the legal title.

On the other hand, in Jerrard *v.* Saunders, 2 Ves. jun. 454, Lord Loughborough held that the plea *could* stand against a *legal* as well as an *equitable* title. In Roper on Husband and Wife, 2d edit. p. 451, the author approves of the doctrine of Williams *v.* Lambe. But a contrary view is taken in a note to this passage by the learned editor, Mr. Jacob.(*a*) And Lord St. Leonards, in his treatise on Vendors and

(*a*) The note is as follows:—"A similar rule was acted on in Rogers *v.* Seale, 2 Freem. 84, 2 Eq. Ca. Abr. 70: and see Medlicott *v.* O'Donel, 1 Ball & B. 171. But the principle that equity will not interfere against a purchaser for valuable consideration without notice, is commonly laid down in general terms without reference to the nature of the plaintiff's title: And in Walwyn *v.* Lee, 9 Ves. 24, 33, the Lord Chancellor held a plea of purchase good to a bill for discovery and relief, founded on a legal title. See to the same effect Jerrard *v.* Saunders, 2 Ves. jun.

Purchasers, c. *18, also expressed his opinion in favour of Lord Loughborough's, and against Lord Thurlow's ruling; and afterwards, as Chancellor of Ireland, decided the case of Joyce *v.* De Moleyns, 2 Jones & Lat. 374, accordingly. A subsequent case of The Attorney-General *v.* Wilkins, 17 Beavan 285, has occurred before Romilly, M. R., and his decision was in accordance with that of Lord St. Leonards. And his Honor stated the principle to be, that, when you once establish that a person is a purchaser for value, without notice, a court of equity will give no assistance against him; but the right must be enforced at law. [*59

It appears, then, that the weight of authority is greatly in favour of the proposition that no bill for a discovery could have been maintained in this case before the Common Law Procedure Act, 1854. Consequently, we think that this rule must be discharged, and with costs.

Rule discharged, with costs.

454, Parker *v.* Blythmore, Prec. in Ch. 58, 2 Eq. Ca. Abr. 79, Robinson *v.* Haynes, Gilb. Eq. Rep. 184. And it seems to be clear that a plea of purchase is a good defence to a bill of discovery, though the plaintiff's title be legal: Burlace *v.* Cooke, 2 Freem. 24, 2 Eq. Ca. Abr. 681; Abery *v.* Williams, 1 Vern. 27; Bishop of Worcester *v.* Parker, 2 Vern. 255; Hoare *v.* Parker, 1 Cox 221, 1 Bro. C. C. 578."

See Bright on Husband and Wife, Vol. 1, pp. 422, 423.

It had been held in several cases in the United States, following Williams *v.* Lambe, cited above, that the plea of purchaser without notice can only be interposed as against an equitable title: Snelgrove *v.* Snelgrove, 4 Dessaus. 274; Blake *v.* Heyward, 1 Bailey Eq. 208; Larrowe *v.* Beam, 10 Ohio 498; Jenkins *v.* Bodley, 1 Sm. & M. Ch. 338; Wailes *v.* Cooper, 24 Mississippi 208; Brown *v.* Wood, 6 Rich. Eq. 155; Daniell *v.* Hollingshead, 16 Georgia 190. But see Flagg *v.* Mann, 2 Sumn. 486. In Colyer *v.* Finch, 19 Beav. 500, an attempt was made to reconcile the conflicting authorities on this question, and the distinction was taken between a case where a bill seeks to establish and enforce a legal title against a *bonâ fide* purchaser, and where the legal title is perfectly clear and distinct, and the object of the bill is merely to enforce an equitable remedy or right attached to that title, as one to foreclose a legal mortgage, in which latter case it was held that the plea furnished no defence. The case was affirmed on this point in the House of Lords: Colyer *v.* Finch, 5 H. L. Cas. 905.

GAUNTLETT *v.* KING and Another. *June* 27.

A. authorized B., a broker, to distrain for rent due to him from C. B., having entered for the purpose of executing the warrant, took away, amongst other things, certain books and papers (which were assumed not to be distrainable), and omitted to insert them in the inventory:—Held, that A. was liable, jointly with B., in trespass.

THIS was an action of trespass against two persons named King and Elliott for seizing and carrying away the plaintiff's goods under colour of a distress for rent. The goods in question consisted of gas-fittings, keys of certain cupboards, and a number of ledgers, day-books, and papers.

*60] *The cause was tried before Williams, J., at the first sitting at Westminster in Easter Term last, when a verdict was taken for the plaintiff, by the direction of the learned judge, for 3*l.* 6*s.*,—the value of the goods the taking of which was complained of being separately assessed by the jury as follows, viz. the gas-fittings at 1*l.*, the keys at 6*s.*, and the books at 2*l.*; and leave was reserved to the defendant to move to reduce the verdict by the sum of 40*s.*, if the court should be of opinion that there was no evidence of prior authority by Elliott to King to seize the books, or of subsequent ratification by the former of the seizure.

As to the books and papers, the facts were these:—Rent being in arrear from Gauntlett to Elliott, the latter authorized King, a broker, to distrain. King, finding the books and papers in a sack in a cupboard on the premises, without (as he said) formally distraining them, took them away to his own house, notwithstanding the remonstrances of the tenant's wife, who said they could be of no value to any one but themselves. Three weeks after the distress, the plaintiff's attorney wrote to Elliott demanding the books and papers; and about a week afterwards King called upon him, and offered to give them up, if the plaintiff would give up possession of the premises to the landlord. Ultimately, however, by the direction of the landlord, King, the broker, gave them up. It did not appear that the books and papers were mentioned in the inventory.

Lush, in Easter Term, obtained a rule nisi to reduce the damages, in accordance with the leave reserved. He submitted that Elliott, the landlord, was not liable in trespass for the act of King, whom he had employed to distrain, in seizing the books and papers, unless he authorized it beforehand or subsequently (with knowledge) assented to it; referring to Freeman *v.* Rosher, 13 Q. B. 780 (E. C. L. R. vol. 66).

*61] **Morgan Lloyd* now showed cause.—There clearly was evidence enough to warrant the jury in coming to the conclusion that the landlord, Elliott, ratified the act of the broker in seizing the books and papers. [WILLIAMS, J.—It was assumed throughout that these things were not distrainable: but I protest I do not understand why not. *Lush.*—There is no doubt everything may be distrained which can be brought back to the premises in the same plight and condition. It may be that these articles were valueless to the distrainor: but the saleable value is not an element in the consideration as to whether they are distrainable. The contention on the part of the defendants at the trial was, that these goods had in truth never been distrained at all.] There can be no doubt that the books and papers were distrained with the other goods: the defendants were not the less guilty of a trespass in taking them away, that they omitted to insert them in the inventory. It is submitted that the landlord was liable for the acts of the broker, under the original authority given to him: but that, at all events, there was ample evidence of ratification to go to the jury.

Lush, Q. C., in support of his rule.—The liability of the landlord for the act of the broker is accurately defined in Freeman *v.* Rosher, 13 Q. B. 780 (E. C. L. R. vol. 66). There, in trespass against a landlord, it appeared that he gave a broker a warrant to distrain for rent, and the broker took away and sold a fixture, *and paid the proceeds to the defendant*, who received them without inquiry, but without knowledge

that anything irregular had been done: and it was held that no such authority or assent appeared as would sustain the action. In delivering the judgment of the court, Patteson, J., said: "It is clear that a principal is not responsible for a trespass by an agent, unless he gave a prior authority or *subsequent assent. Here, the warrant was the only prior authority, and clearly did not extend to destroying a [62 building or removing a fixture. The chief reliance was therefore placed on the receipt of the money as proof of a subsequent assent; but, as the defendant had no knowledge that a trespass had been committed, and received it in the belief that his warrant had been lawfully executed, the receipt under such circumstances is no evidence of assent. Where the principal is responsible for damage arising from the want of skill or mistake of the agent in the course of the performance of his employment, the principal is not responsible in trespass, but in case; and the form of the action involves an interest of some importance, as the measure of damages in an action on the case would be confined to an indemnity." Here, neither did the landlord authorize the trespass, nor did he ratify it. The books and papers were not distrained. It is true the broker removed them off the premises; but they were never treated as part of the distress. [WILLIAMS, J.—The evidence showed that the asportation was complete before the landlord ascertained what he had taken: I have no doubt. COCKBURN, C. J.—Do you contend that a landlord who gives a general authority to a broker to distrain, is not responsible for the act of the broker in exceeding his authority?] There would be little difficulty, it is submitted, in sustaining that proposition, if the rule were so framed as to admit the argument. These articles, however, never were distrained at all.

COCKBURN, C. J.—It is clear that this rule must be discharged. The books and papers in question were undoubtedly taken by way of distress. The broker whose business it was to make the levy, found the articles, amongst other goods of the tenant, in a cupboard, and he seizes them all. It appears to me that that puts an end to the question.

*WILLIAMS, J.—I am entirely of the same opinion. In either [*63 view, the plaintiff must be entitled to succeed. The articles in question were clearly taken as a distress. They were carried away by King's orders, in spite of the remonstrances of Gauntlett's wife. Whichever account, therefore, was the true one, the books, &c., were taken as a distress for the landlord. Finding afterwards that the broker had made a mistake, he caused them to be returned to the plaintiff. He could not purge the trespass which was already complete, by omitting to insert these things in the inventory. King was clearly acting as the agent of Elliott, and both are liable. Rule discharged.

*TABOR *v.* EDWARDS. *June* 25. [*64

At the post-terminal sittings in banc, no business can be taken except that of which notice has been given.

THIS case (a demurrer) was called on in its turn on the first day of these sittings, and was struck out.

Archibald, for the plaintiff, now moved that the case might be restored to the paper.

CRESSWELL, J.—We are sitting here under the authority of an act of parliament,(*a*) for the purpose of disposing of such business as is specified in the notice which has been given.(*b*) You are now making an original motion. We have no power to entertain it.

The rest of the court concurring,

Archibald took nothing.

(*a*) These post-terminal sittings in banc were originally held under the authority of the statute 1 & 2 Vict. c. 32, "for the purpose of disposing of business then pending and undecided," s. 1: and the 2d section enacted that such sittings should be holden by virtue of a rule or order, to be made in or out of term, whereof a week's notice should be published in the London Gazette, and affixed on the outside of the court, and in the judges' chambers and masters' offices, specifying the particular business to be taken thereat. Now, by the 95th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, it is provided that "the superior courts may appoint and hold sittings either in banc or for the trial of issues in fact by judge or jury, at any time or times, whether in term or vacation, not being between the 10th of August and the 24th of October." The notice in the Gazette is no longer given.

(*b*) The notice intimated that the court would proceed in disposing of the business pending in the "special paper" and in the paper of "new trials."

65*] *JONES *v.* THE PROVINCIAL INSURANCE COMPANY.

July 4.

Upon effecting a policy on his life, in February, 1855, the proposed assured signed a declaration, as the basis of the insurance, stating "that his age did not exceed twenty-nine years; that he had had the small-pox or cow-pox; that he had not had certain specified diseases; that no proposal to insure his life had been declined at any office; that he was then in good health, and did ordinarily enjoy good health; and that *he was not aware of any disorder or circumstance tending to shorten his life, or to render an insurance on his life more than usually hazardous*, unless anything stated in answer to certain questions which preceded the declaration might be so considered."

In an action upon the policy, by the administrator of the assured, it appeared, that, in 1853 and 1854, the deceased had had two severe bilious attacks. A medical man who had attended him on those occasions stated that there was nothing in those illnesses which tended to shorten his life or to render it less insurable, and that his state of health after them was as good as ever. Two other medical men,—one of whom had seen him on the last occasion,—stated, that, in their judgment, those illnesses did tend to shorten his life and to render him ineligible for insurance; but it did not appear that their opinions had ever been communicated to the assured. The judge told the jury, that, "if the assured honestly believed at the time he made the declaration, that the bilious attacks had no effect upon his health, and did not tend to shorten his life or to render an insurance upon it more than usually hazardous, the fact that he was aware that he had had those attacks, even though (without his knowledge) they had such a tendency, would not defeat the policy:"—Held, that this direction was correct.

THIS was an action brought by the plaintiff as administrator of John Powell Jones, deceased, against the Provincial Insurance Company, upon a policy of insurance for 1000*l.* effected by the intestate upon his own life, in the office of the company, on the 28th of February, 1855.

The declaration stated, that, by a certain policy of assurance made on and bearing date the 28th of February, 1855, signed by three of the directors of the said company, sealed with their common seal,—after reciting that the said John Powell Jones had proposed to effect an assurance with the defendants in the sum of 1000*l.* upon his own life, payable at death, and had delivered into the office of the defendants a declaration in writing, duly signed by the said John Powell Jones, and bearing date the day of the date of the said policy, whereby it was declared (amongst other things set forth) that the age

of the said John Powell Jones did not then exceed twenty-nine years, and that he had never been afflicted with rupture, insanity, gout, fits, apoplexy, palsy, dropsy, dysentery, scrofula, any affection of the liver, *spitting [*66 of blood, consumptive symptoms, asthma, habitual cough, any affections of the lungs, or any other disease, ailment, or infirmity tending to the shortening of life; nor was he addicted to any habit tending to shorten life; that he had had the small pox, scarletina, measles, and whooping-cough, and had been vaccinated successfully; that he was then in a good state of bodily health, and did ordinarily enjoy good health; and that the said John Powell Jones was not aware of any circumstance, or that he had had any disorder tending to shorten his life, or to render an assurance on his life more than usually hazardous; which said declaration it was agreed should be the basis of the contract between the said John Powell Jones and the said company for the said assurance; and that the said John Powell Jones had paid to the defendants the sum of 20*l.* 15*s.* for the said assurance for the space of twelve calendar months, commencing on the day of the date of the said policy, and terminating on the 27th of February, 1856, the receipt whereof was thereby acknowledged,—it was witnessed that it was thereby declared and agreed by the defendants, that, in case the said John Powell Jones should die before or upon the said 27th of February, 1856, or in case he should survive that day, he or his assignees should on or before the 28th of February, 1856, and on the 28th of February in each and every succeeding year during the continuance of the said assurance, well and truly pay or cause to be paid to the defendants the like premium or sum of 20*l.* 15*s.*, then and in such case the stocks, funds, and property of the defendants should, according to the provisions of the deed of settlement of the said company, and according to the provisions of the statute passed in the eighth year of the reign of Her present Majesty, intituled "An act for the registration, incorporation, and regulation of joint stock companies," and after satisfying *all prior claims and demands thereon, be subject or [*67 liable to pay, satisfy, and make good to the executors, administrators, or assigns of the said John Powell Jones, within three calendar months next after proof satisfactory to the board of directors of the said company should have been given of the death of the said John Powell Jones, the sum of 1000*l.*: Provided always, and the said policy was upon the express condition, that, if any statement or allegation contained in the declaration thereinbefore referred to should be untrue, or if the assurance thereby effected should have been obtained through any fraud, misrepresentation, concealment, or untrue averment whatsoever, then the said policy should be null and void to all intents and purposes, and all premiums and other moneys paid in respect thereof should be forfeited to the defendants: Provided also, that the stocks, funds, and property of the defendants, or so much thereof as for the time being should remain unapplied and undisposed of and inapplicable to prior claims and demands in pursuance of the trusts, powers, and authorities contained in the said deed of settlement, should alone be answerable for all claims or demands under or in respect of the said policy, and neither the directors executing the said policy nor any of them, nor any other proprietor or holder of a share or shares in the capital of the said company, should be personally subject or liable to

any claim or demand under or in respect of the said policy, beyond the amount of share or shares then held by him, her, or them in the said capital, and which should not be subject to prior claims and demands, it being one of the original and fundamental principles of the said company that the responsibility of the individual shareholders should in all cases and under all circumstances be limited to their respective shares in the said capital: Provided also, that the said policy and the said
*68] assurance should be *subject to the several conditions and regulations printed on the back thereof, so far as the same could be applicable, in the same manner as if the same were respectively repeated and incorporated in the said policy,—which said conditions and regulations so printed on the back of the said policy were and are in the words and figures following, that is to say, "1. This policy will not become void if the premium be paid within thirty days next after the same shall have become payable; but, if the premium shall not be paid before the expiration of thirty days from the day on which the same shall have become payable according to the terms of the policy, or to any subsequent agreement with the company, then the policy shall be void: 2. If the age of any person, or of any one of the persons, on whose life or lives an assurance shall be effected by any policy, shall exceed the age stated in the declaration, it shall be lawful for the board of directors, if they in their discretion shall think fit (but not otherwise), to declare that the policy shall not be void on that account, and to allow such a sum or sums to be paid on such policy, upon the dropping thereof, as would have been assured thereby for the annual or other premium or premiums actually paid in respect thereof, if the age of the person on whose life the assurance shall be effected had been correctly stated in the declaration: 3. Policies will become void, if the parties whose lives have been assured shall go out of Europe (except to Madeira), or shall die on the high seas (except in passing from one part of the united kingdom of Great Britain and Ireland to another, or from or to any part of the united kingdom of Great Britain and Ireland to or from any of the islands of Guernsey, Jersey, Alderney, Sark, or Man, or from any one of the same islands to any other of them, or from or to Madeira, and also, in time of peace, from any part of England to any other part of Europe); but the
*69] *foregoing exception is not to extend to persons who at the time of death on the high seas shall be employed in a sea-faring capacity, or, being or becoming military or naval men, shall be called into actual service, unless in such case previous permission shall have been obtained from the board of directors, and such additional premium paid as the board of directors shall judge adequate to the increase of risk: 4. Assurances made by persons on their own lives, who shall die by duelling, or by their own hands, or by the hands of justice, will become void so far as respects such persons, but shall remain in force so far as any other person or persons shall then have a bonâ fide interest therein, acquired by assignment or by legal or equitable lien, upon due proof of the extent of such interest being made to the directors: 5. If any person who shall have been assured upon his or her own life for at least five years, or shall have paid a sum equivalent to five years annual premium, shall die by duelling, by the hands of justice, or by his or her own hands, and not felo de se, the board of directors shall be at liberty to pay his or her legal

representatives the sum that the company would have paid for the purchase of his or her interest in the policy, if it had been surrendered on the day previous to his or her decease, provided the interest in such assurance shall be in the assured or in a trustee or trustees for his, her, or for their children at the time of her or his decease: 6. All claimants, upon the decease of any person whose life shall have been assured by the society, will be required to furnish such proof of the cause and date of death, and to give such further information respecting the same, as the directors shall think reasonable; and proof will be required of the date of birth, unless that fact shall have been established or admitted by the board of directors, and endorsed on the policy." Averment that the said John Powell Jones survived the 27th of *February, 1856, and duly, and within the time limited in that behalf in and by the said policy and [*70 the said conditions and regulations, paid to the defendants the said annual premium of 20*l.* 15*s.* for keeping the said policy in force from the last-mentioned day for twelve calendar months, then next ensuing, and the defendants accepted the last-mentioned premium for the purpose last aforesaid, and the said policy, at the time of the death of the said John Powell Jones hereinafter mentioned, was and continued in full force and effect; and that, whilst the said policy was in such full force and effect, and before this suit, the said John Powell Jones died: That, at the time of the death of the said John Powell Jones, and thenceforth hitherto, the stocks, funds, and property of the said company were and had always been sufficient, according to the provisions of the deed and deeds of settlement of the said company, and according to the provisions of the said statute in the said policy mentioned as aforesaid, and after satisfying all prior claims and demands thereon, to pay, satisfy, and make good to the plaintiff, as such administrator as aforesaid, the said sum of 1000*l.*, according to the tenor and effect, true intent and meaning of the said policy and the said conditions and regulations; and that, before this suit, all conditions precedent had been performed and fulfilled, and everything had happened and been done, and all times had elapsed, necessary to entitle the plaintiff, as such administrator as aforesaid, to receive the said sum of 1000*l.*, and to maintain this action for the recovery thereof; yet the said sum of 1000*l.* had not been paid, satisfied, or made good to the plaintiff, as such administrator as aforesaid, and was still wholly due and unpaid, contrary to the form and effect of the said policy: And the plaintiff, as administrator as aforesaid, claimed 1100*l.*

The defendants pleaded,—first, that the declaration *in the said [*71 policy mentioned, and therein stated to be the basis of the said contract between the said John Powell Jones and the defendants, was untrue in this, that, before and at the time of making the same, the said John Powell Jones *was not in a good state of bodily health, and did not ordinarily enjoy good health.*

Secondly,—that the said declaration in the said policy mentioned was untrue in this, that, before and at the time of making the same, the said John Powell Jones *had been and was afflicted with a disease,* ailment, or infirmity *tending to the shortening of life.*

Thirdly,—that the said declaration in the said policy mentioned was untrue in this, that, before and at the time of making the same, the said John Powell Jones was addicted to a habit, to wit, a habit of intemperance, tending to shorten life.

Fourthly,—that the said declaration in the said policy mentioned was untrue in this, that, at the time of making the same, the said John Powell Jones *was aware of circumstances which rendered an assurance on his life more than usually hazardous.*

Fifthly,—that the said declaration in the said policy mentioned was untrue in this, that, before and at the time of making the same, the said John Powell Jones *was aware that he had a disorder tending to shorten his life, or to render an assurance on his life more than hazardous.*

Sixthly,—that the defendants were induced to make and enter into the said policy, and that the said policy was effected with and obtained from them, by and through fraud, misrepresentation, concealment, and untrue averments of material facts by and on behalf of the said John Powell Jones and his agents in that behalf.

Upon each of these pleas the plaintiff took and joined issue.

*72] *The cause was tried before Martin, B., at the last Spring Assizes at Liverpool. The facts which appeared in evidence were as follows:—The policy upon which the action was brought was executed on the 28th of February, 1855, and was founded upon a proposal which negatived the existence of any special circumstances affecting the value of the life to be assured,—such as, having had gout, rupture, *any severe malady*, especially within the last seven years, any wounds, having been intemperate, &c.,—and a declaration as follows:—"I, the above-named John Powell Jones, do hereby declare that my age does not exceed twenty-nine years; that I have had the small-pox or cow-pox; that my habits are temperate; that I have not had gout, dropsy, asthma, insanity, habitual cough, spitting of blood, nor (since infancy) any rupture, fits, or convulsion; that no proposal to insure my life has been declined at any office; that I am now in good health, and do ordinarily enjoy good health; and that *I am not aware of any disorder or circumstance tending to shorten my life, or to render an assurance on my life more than usually hazardous*, unless anything stated above may be so considered."

It appeared, that, down to the year 1851, John Powell Jones, the assured, had resided with his father in Liverpool; that he was not a person of robust health, being subject to attacks of dyspepsia; that, in 1850, by the advice of a medical man at Liverpool, he went a voyage to the Mediterranean; that, in 1851, his father placed him in a farm near Holywell; that, in November, 1853, he had a rather severe bilious attack, which confined him to his bed for three days, and, in May, 1854, a still more serious attack of the same sort, which confined him to his bed about a week; and that, in August, 1856, he was seized with a severe illness, which ultimately terminated in his death on the 4th of November in that year.

*73] *A medical man, named Parry, was called on the part of the plaintiff. He stated, that he attended the assured on the occasion of his illness in 1853, which he described as an ordinary bilious attack, which yielded to the common remedies, and did not in any degree injure his constitution, or render his life less good; that he also attended him in his illness of 1854, which was an attack of the same sort, but more severe; but that he recovered from it very rapidly, and became in as good health as he had been in before; and that he detected no organic disease at all in him. Upon cross-examination, the witness stated that the deceased laboured under a very irritable condition of stomach, but

nothing amounting to organic disease; though he admitted that the life of a man subject to such attacks was less valuable as an insurance.

This gentleman was the person referred to as the medical attendant of the assured at the time the insurance was effected. He stated that he did not allude to the illnesses of 1853 and 1854 in his answers to the questions put to him on that occasion, because he thought neither of them of sufficient consequence to call for mention.

On the part of the defendants, two medical witnesses were called, viz: Mr. Neild and Mr. Gee,—the former of whom had been taken from Liverpool to see the assured during his illness in May, 1854, and the latter of whom, as the company's medical referee, had examined the assured prior to the making of the policy.

Mr. Neild described the illness of May, 1854, as being so severe as to induce him to tell the father of the assured that his case was hopeless; that, though he could not say that there was organic disease, he thought the patient could not recover, and that, if he did, great care as to diet would be essential to prolong his life; that, after that illness, the life was not eligible, and *should not have been recommended by any medical man who was aware of the circumstances; that it rendered an assurance on his life more than usually hazardous; and that there were symptoms of chronic inflammation of the stomach, and a highly sensitive condition of the nervous system. [*74

Mr. Gee stated, that when he examined the deceased with a view to the insurance of his life, he made no mention of the illnesses of 1853 and 1854, nor did he state that he had been attended on those occasions by Mr. Neild and Mr. Parry; that, in his (the witness's) judgment, those illnesses had a tendency to make an insurance upon his life more than usually hazardous, and were an important element to be mentioned in any statement of his case: but he admitted, that, at the time he examined him, the deceased appeared to be in perfect health.

It did not appear that either of the medical men who had attended the assured in 1853 and 1854 had ever intimated to him the serious character of those attacks, or that his life was thereby rendered more precarious. No evidence was offered in support of the third and sixth pleas.

On the part of the defendants, it was insisted that the policy was avoided by the falsity of the declaration signed by the assured as the basis of the insurance; and that it was enough for them to show that the illnesses of 1853 and 1854 did in fact tend to shorten the life of the assured, or to render an insurance upon it more than usually hazardous, without showing that the assured was aware that they were of that character.

For the plaintiff it was submitted, that whatever the tendency of those illnesses, if the assured, at the time he made the declaration, was unaware of their having a tendency to shorten his life or to render an insurance thereon more than usually hazardous, he was guilty of no fraud in abstaining from mentioning them.

*The learned judge told the jury, that if the assured honestly believed, at the time he made the declaration, that the bilious attacks in 1853 and 1854 had no (permanent) effect upon his health, and did not tend to shorten his life, or to render an insurance upon his life more than usually hazardous, the fact that he was aware that he had [*75

those attacks (even though, without his knowledge, they had such a tendency), would not defeat the policy.

The jury returned a verdict for the plaintiff for the amount mentioned in the policy.

Atherton, Q. C., in Easter Term last, obtained a rule nisi for a new trial, on the ground of misdirection "with reference to the issues raised on the first, second, fourth, and fifth pleas, in this, that it was immaterial as regards the issues on the first and second pleas whether John Powell Jones was aware of the untruth of the declaration, provided it was untrue in fact; and in this, that, as regards the issues on the fourth and fifth pleas, it was immaterial whether John Powell Jones knew of the consequences or effect of the attacks of 1853 and 1854, if he knew of such attacks in point of fact." He referred to the case of Anderson *v.* Fitzgerald, 4 House of Lords Cases 484. There, one F. applied to an insurance office to effect a policy on his life. He received a form of "proposal," containing questions requiring to be answered. Among these were the following: "Did any of the party's near relations die of consumption or any other pulmonary complaint?" and "Has the party's life been accepted or refused at any office?" to each of these questions F. answered "No." The answers were false. F. signed the proposal, and a declaration accompanying them, by which he agreed "that the particulars mentioned in the above proposal should form the
*76] basis of the contract." The policy *mentioned several things which were "warranted" by F. The subjects of these two answers were not included in such warranty. The policy also contained a proviso, that, "if anything so warranted should not be *true*, or if any circumstance material to that insurance should not have been truly stated, or should have been misrepresented or concealed, or any false statements made to the company in or about the obtaining or effecting of this insurance," the policy should be void, and the moneys paid should be forfeited. In an action on the policy, it was held by the House of Lords,—reversing the judgments of the courts of Exchequer and Exchequer Chamber in Ireland,—that it was a misdirection to leave it to the jury to say whether the answers to the two questions were material as well as false, and, if not material, that the plaintiff was entitled to the verdict: for, that, the representation being part of the contract, its truth, not its materiality, was in question. In delivering his opinion in that case, Lord St. Leonards says, p. 509: "The word 'true' there is used, of course, in a general sense; and, whether the man knew it to be true or false, is utterly immaterial. Whether the circumstances warranted were material or not, is entirely out of the question. It is simply sufficient, and ought to be sufficient, to avoid the policy, that any one thing warranted is not true; and therefore the word 'untrue' there is used in its general sense of an untruth in the abstract. It signifies not whether he did or did not know it to be untrue; it signifies not whether the circumstances were material or immaterial, the contract is to be avoided."

Knowles, Q. C., *Edward James*, Q. C., and *Blackburn*, in Trinity Term, showed cause.—The declaration of the assured upon which the pleas are framed, contains certain matters the assertion or negation of which
*77] amounts *to a warranty; for instance, that the party whose life is proposed to be insured has had the small-pox, is of temperate

habits, has not had gout, dropsy, &c., is in good health, and ordinarily enjoys good health. In the part which follows,—"I am not aware of any disorder or circumstance tending to shorten my life, or to render an assurance on my life more than usually hazardous," the party is speaking only as to his own knowledge and belief. [CRESSWELL, J.—The question is, who is to be the judge as to whether or not a particular disorder has a tendency to shorten life, or to render an assurance thereon more than usually hazardous? Is the party's own opinion and judgment to be the guide, or is it to depend upon the opinion and judgment of somebody else? Knowing all the circumstances attending the illness, the assured may honestly think it unimportant. Must he take the risk of other people thinking that it has a tendency to shorten life?] If the contract is to receive the construction contended for on the part of the defendants, it follows, that, if the assured had a fever twenty years before the date of his proposal, he would be bound to mention it. [CRESSWELL, J.—No. But it may be that he is bound to disclose all circumstances which in the opinion of a jury, guided by the evidence of medical men, are material.] It appears, that, in the year 1853, the assured had an attack of illness which in a few days yielded to the ordinary remedies, and that, in 1854, he had a somewhat more serious attack of the same sort. But Mr. Parry, who attended him on both those occasions, and Dr. Neild, who saw him on the last occasion, both proved that he had no organic disease, and that there was nothing in those illnesses which had a tendency to shorten his life. And it was clearly shown, that, at the time of the insurance, in February, 1855, he was in perfect health. [CRESSWELL, J.—The argument on the other side will be, that *any concealment by the assured of facts within his knowledge which it was material to the insurers to be made [*78 acquainted with in order to guide their judgment, avoids the policy.] That necessarily must have reference to the party's own belief. Anderson *v.* Fitzgerald, 4 House of Lords Cases 484, merely decides, that, whether material or not, the questions being part of the contract upon which the insurance was founded, the party was bound to answer them truly. That is very different from the matter now before the court. [CRESSWELL, J.—Lindenau *v.* Desborough, 8 B. & C. 586 (E. C. L. R. vol. 21), 3 M. & R. 45, is more like this case.] In that case it was held that it is the duty of a party effecting an insurance on life or property to communicate to the underwriter all material facts within his knowledge touching the subject-matter of the insurance; and that it is a question for the jury whether any particular fact was or was not material. That, however, was a case of fraudulent concealment: and Lord Tenterden said that "the general question (*a*) put by the office requires information of every fact which any reasonable man would think material." The fact undisclosed there was clearly material, and was known to the person effecting the insurance. [CRESSWELL, J.—The whole court lay it down that the materiality was a question for the jury; and that it was not enough to excuse the concealment, that the party did not know it to be material.] No doubt. But what is meant by a material circumstance within the party's knowledge? Clearly something which in his judgment is material. "It must be a *fraudulent* concealment of

(*a*) "Whether the party knew any other circumstances that ought to be communicated to the directors."

circumstances that will vitiate a policy:" per Lord Mansfield, in Meyne *v.* Walter, 1 Park Ins. 304 (ed. 1817), 8th edit. 431: Carter *v.* Boehm, *79] 1 W. Bla. 593, 3 Burr. *1918. [CRESSWELL, J.—Bufe *v.* Turner, 6 Taunt. 338 (E. C. L. R. vol. 1), 2 Marsh. 46 (E. C. L. R. vol. 4), has some bearing upon the present case. There, the plaintiff, having one of several warehouses next but one to a boat-builder's shop which took fire, on the same evening, after that fire was apparently extinguished, gave directions, by an extraordinary conveyance, for insuring that warehouse, then having others uninsured, but without apprising the insurers of the neighbouring fire. Though the terms of the insurance did not expressly require the communication, and the jury acquitted the plaintiff of any fraud or dishonest design, the court held that the concealment of this fact avoided the policy.] Duckett *v.* Williams, 2 C. & M. 348,† will doubtless be relied on for the defendants: but the language of the policy and declaration there were very different from those now under consideration: and nearly all the cases are explainable upon the same principle.

Hugh Hill, Q. C., and *Manisty*, Q. C., in support of the rule.—The provision upon which this question turns was introduced for the protection of the insurers,—a circumstance which is not to be lost sight of in putting a construction upon it. It clearly was not necessary, to avoid this policy, that there should have been a *fraudulent* concealment: it was enough if there was an omission on the part of the assured to disclose any circumstance which had a tendency to the shortening of his life, or to render an insurance upon it more than ordinarily hazardous. The proper question was not whether any circumstance existed which in his belief had such a tendency, but whether any existed which in point of fact had such a tendency. In Lindenau *v.* Desborough there was no fraud. Bayley, J., there said: "I think, that, in all cases of insurance, whether on ships, houses, or lives, the underwriters should be *80] *informed of every material circumstance within the knowledge of the assured; and that the proper question is, whether any particular circumstance was in fact material, and not whether the party believed it to be so. The contrary doctrine would lead to frequent suppression of information, and it would often be extremely difficult to show that the party neglecting to give the information thought it material. But, if it be held that all material facts must be disclosed, it will be the interest of the assured to make a full and fair disclosure of all the information within their reach." And Littledale, J., said: "I think the question, on such a policy, is, not whether a certain individual thought a particular fact material, but whether it was in truth material; and of that the jury are by law constituted the judges." Bufe *v.* Turner, 6 Taunt. 338, 2 Marsh. 46, is a distinct authority to the same effect. The note of Meyne *v.* Walter, cited from Park on Insurance, can hardly be correct; and it certainly is inconsistent with the judgment of the same learned judge in Carter *v.* Boehm, 1 W. Bla. 593, 3 Burr. 1918. In Duckett *v.* Williams, 2 C. & M. 348,† by a declaration and statement as to health, &c., signed by the assured previously to effecting a policy on a life, it was agreed, that, if *any untrue averment was contained therein*, or if the facts required to be set forth in the proposal (annexed) were not *truly* stated, the premiums should be forfeited, and the insurance be absolutely null and void. The statement as to the health of the life

was untrue in point of fact, but not to the knowledge of the party making it: nevertheless, it was held that the premiums were forfeited, and could not be recovered back. "A statement," says Lord Lyndhurst, C. B., "is not the less untrue because the party making it is not apprised of its untruth: and, looking at the context, we think it clear that the parties did not mean to restrict the words in the manner *contended for. Two consequences are to follow if the statement be untrue,—one, that the premiums are to be forfeited,—the other, that [*81 the assurance is to be void. Now, if the statement were untrue within the knowledge of the party making it, the assurance would be void without any such stipulation. The knowledge of the party is clearly immaterial as to this last consequence, and therefore must be so as to the first; for, it would be contrary to all the rules of construction to hold that it was material as to one consequence, and not as to the other." [COCKBURN, C. J.—If it amounts to a warranty, the knowledge of the party would be immaterial. But, where the party says,—"I am not aware of any circumstance having such and such a tendency,"—does he do more than pledge his own opinion and belief?] It is submitted that the words must be taken to amount to a warranty that the assured was not aware of any circumstance or disorder which in point of fact tended to shorten his life or to render an assurance on his life more than ordinarily hazardous,—not, as is suggested on the other side, that he was not aware that the circumstances of which he *was* aware had the tendency stated. According to the doctrine of the case of Anderson *v.* Fitzgerald, 4 House of Lords Cases 485, "untrue" means untrue in fact: the assured takes upon himself the risk of that which he avers to be true turning out to be untrue. [COCKBURN, C. J.—It would have been easy to require the party expressly to negative his having had any disease or ailment tending to shorten his life or to render an assurance thereon more than ordinarily hazardous.] The evidence showed that the life was not an insurable one. The two serious attacks in 1853 and 1854 ought to have been communicated to the insurers. The manner in which the case was presented to the jury clearly was not in accordance with the authorities.

*COCKBURN, C. J.—I think we are hardly in a position to deal [*82 with this case, without first ascertaining from my Brother Martin how he presented the question to the jury. Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court:—

This was an action brought by the plaintiff as administrator of John Powell Jones, deceased, against The Provincial Insurance Company, upon a policy of insurance for 1000*l.*, effected by the intestate upon his own life, in the office of the defendants, upon the 28th of February, 1855.

The policy stated that the intestate had delivered into the office of the defendants a declaration in writing signed by him, and being of the same date as the policy, which it was agreed should be the basis of the contract of assurance.

By the declaration actually signed, it was declared that the age of the assured did not exceed twenty-nine years, that he had had the small-pox or cow-pox, that he had not had certain specified diseases, that no proposal to insure his life had been declined at any office, that he was then in good health and did ordinarily enjoy good health, and that "he was not aware of any circumstance or disorder tending to shorten his

life or to render an assurance on his life more than ordinarily hazardous," unless anything stated in answer to certain questions which preceded the declaration might be so considered. The assured also thereby declared that the medical and private referees named by him in answer to two of those questions were competent to give information as to his past and present state of health and habits of life. The declaration so made was in some respects erroneously recited in the policy, particularly *83] *in adding to the statement that the assured had never been afflicted with the specified diseases, the words "or any other disease, ailment, or infirmity tending to the shortening of life." It, however, also contained the statement that the intestate "was not aware of any circumstance, or that he had had any disorder, tending to shorten his life, or to make an insurance on his life more than usually hazardous."

The declaration in the cause is in the usual form, stating the policy, the payment of premiums, the death of the assured, and the performance of conditions precedent.

The important pleas were the second, fourth, and fifth.

The second plea stated that the declaration in the policy mentioned was untrue, in this, that, at the time of making it, the assured had been and was afflicted with a disease, ailment, or infirmity tending to the shortening of life.

The fourth plea was, that the declaration was untrue in this, that, at the time of making it, the assured was aware of circumstances which rendered an assurance on his life more than usually hazardous.

The fifth plea was, that the declaration was untrue in this, that, at the time of making it, the assured was aware that he had had a disorder tending to shorten his life, or to render an assurance upon it more than commonly hazardous.

Issues in fact were joined upon these pleas.

At the trial, before Martin, B., it appeared that the assured had had a bilious attack,—not being one of the specified illnesses,—in November, 1853, and another in May and June, 1854. The evidence as to the character of these attacks was contradictory: according to the evidence *84] of Mr. Parry, a medical man who attended *the assured in both those illnesses, and also in that which caused his death in 1856, there was nothing in the illnesses of 1853 and 1854 to shorten or affect the life of the assured or make it less good. He stated that the assured recovered rapidly from them, and that his state of health afterwards was as good as ever.

The evidence of other medical men conflicted with that of Mr. Parry; but it did not appear that their opinion had ever been communicated to the assured.

We are informed by the learned judge that the defendants at the trial relied altogether upon the statement at the foot of the proposal and declaration actually signed by the assured, commencing, "I, the above-mentioned John Powell Jones," and insisted, that, under the words "I am not aware of any disorder or circumstance tending to shorten my life, or to render an assurance on my life more than usually hazardous," it was enough for them to show that the illnesses of 1853 and 1854 did in fact tend to shorten the life of the assured, or to render an assurance upon it more than usually hazardous, without showing that the assured was aware that they were of that character.

The defendants did not at the trial rely upon the declaration recited in the policy as being more stringent than that actually signed, nor did they refer to or rely upon the answers to the questions preceding the declaration, commencing "I, the above-named, &c."

The learned judge ruled and directed the jury, that, if the assured honestly believed at the time he made the declaration that the bilious attacks had no effect upon his health, and did not tend to shorten his life, or to render an assurance upon his life more than usually hazardous, the fact that he was aware that he had had those attacks, even though (without his knowledge) *they had such a tendency, would not defeat the policy. The jury found for the plaintiff, for the amount of the policy. [*85

In Easter Term last, a rule was obtained for a new trial, upon the ground of misdirection with reference to the issues raised with reference to the first, second, fourth, and fifth pleas, in this, that it was immaterial as regards the issues on the first and second pleas whether John Powell Jones was aware of the untruth of his declaration, provided it was untrue in fact; and in this, that, as regards the issues on the fourth and fifth pleas, it was immaterial whether John Powell Jones knew of the consequences or effect of the attacks of 1853 and 1854, if he knew of such attacks in point of fact.

The rule was fully argued before the Lord Chief Justice, my Brother Willes, and myself; and we took time to consider.

In our opinion, the course taken at the trial renders it unnecessary to pronounce any judgment upon any of the points argued, except the construction of the declaration actually signed. No point was made at the trial as to the effect of the answers to the questions preceding the declaration signed, or as to the plaintiff being bound by the recital in the policy, though untrue. And there was an obviously good reason for abstaining from insisting upon those matters, inasmuch as they would unquestionably have been distasteful to the jury, who would, after all, assuming the defendants to be right upon those points, have had to pronounce upon the question of materiality. The defendants, therefore, cannot now be heard to argue any such point not raised at the trial; and the only one there raised and decided, was,—first, that the declaration "I am not aware of any disorder or circumstance tending to shorten my *life," &c., referred not merely to the knowledge of the assured of the disorder or circumstance, but also to his knowledge that it tended to shorten life, &c. [*86

In the argument, we were referred by the defendants' counsel to several authorities,—amongst others, Lindenau *v.* Desborough, 8 B. & C. 586, 3 M. & R. 45,—as establishing the proposition which, as a general rule, is indisputable, that it is the duty of a party effecting an insurance on life or property to communicate to the underwriter or other insurer all material facts within his knowledge touching the subject-matter of the insurance, and that it is a question for the jury whether any particular fact was or was not material to be communicated. It is, however, equally clear that the underwriters may in any particular case limit their right in this respect to that of being informed of what is in the knowledge of the assured, not only as to its existence in point of fact, but also as to its materiality: and in our opinion that is the effect of the limited declaration required in the present case as to disorders or circumstances tending to shorten life or to render an insurance upon the

life insured more than ordinarily hazardous. Therefore, upon the construction of that clause which alone was relied on at the trial, we are of opinion that the direction of the learned judge was right, and that the rule for a new trial ought to be discharged. Rule discharged.

But where an applicant for life insurance answered an interrogatory, whether he had ever been afflicted with pulmonary disease, in the negative; and, in answer to an interrogatory, whether he was then afflicted with any disease or disorder, and what, stated that he could not say that he was afflicted with any disease or disorder, but that he was troubled with a general debility of the system; and the applicant was then in point of fact in a consumption, the incipient symptoms of which had begun to develop themselves five months before, and were known to him, but not disclosed to the insurers, although they were sufficient to have induced a reasonable belief on his part that he had the disease; it was held that, whether these statements amounted to a warranty or not, they were so materially untrue as to avoid the policy, although it was found that the assured, at the time of his application, did not believe that he had any pulmonary disease, and that the statements made by him were not intentionally false, but, according to his belief, true: Vose *v.* The Eagle Life and Health Insurance Co., 6 Cush. 42.

*87] *THOMAS ASHLEY SUTTON, by ROBERT M'CLIVE, his next Friend, *v.* WILLIAM SADLER and EDWARD DAVENPORT. *July* 4.

The presumption that every man is sane, until the contrary is proved, is not a presumption of law, but a presumption of fact, or, at the most, a mixed presumption of *law and fact.*

The competency of a testator is to be assumed until it is impeached by evidence: but it is not to be assumed, as a matter of law, that a will is valid, as made by a competent testator, unless the court or jury who have to decide upon it are convinced that he was *competent.*

Therefore, he who relies upon a will, in opposition to the title of the heir-at-law, must prove that it is the will of a person of sound and disposing mind. Such proof having been given, if incompetency of the testator to make a will be alleged, it is incumbent on the party alleging it to prove it.

In an action by heir-at-law against devisee,—the question in issue being as to the capacity of the testator to make a will—the judge in his summing-up told the jury "that the heir-at-law was entitled to recover unless a will was proved: but that, when a will was produced, and the execution of it proved, the law presumed sanity, and therefore the burthen of proof was shifted; and that the devisee must prevail, unless the heir-at-law established the incompetency of the testator; and that, if the evidence was such as to make it a measuring cast, and leave them in doubt, they ought to find for the defendant:"—Held, a misdirection.

In ejectment by her against devisee, the heirship being admitted, the defendant is entitled to begin.

Upon a question between heir and devisee as to the competency of the testator at the time of making the will, a witness having been called on the part of the defendant to prove certain statements made by him relative to the property he took under the will of his father,—the last-mentioned will was offered, as well to show the opinion entertained of him by his father as to competency to manage property, as to show that the statements so proved to have been made by him were consistent and true. Upon an objection taken by the plaintiff's counsel to its admissibility, and a doubt being expressed by the learned judge, the defendant's counsel withdrew the document:—Held, that the circumstance of the judge, in his summing-up, observing upon the objection and the non-production of that will as affording a fair inference that the will if produced would show that the testator (whose will was in question) well knew what he was saying when he made the declarations respecting it, was no misdirection,—although apparently giving effect to evidence which had been ruled to be inadmissible.

Held also, that it was no misdirection in point of law to tell the jury that they might take into their consideration statements made by the testator as to the dispositions contained in his

will, and which in fact corresponded therewith, as throwing back light on the period at which the will was executed (a year before), and as affording means of inferring what was the state of his competency at that period.

THIS was an action of ejectment for the recovery of lands in Cheshire. The cause came on for trial before Bramwell, B., at the last Assizes at Chester, and occupied four days. The question turned upon the competency of one William Walter Sutton, who died in the year 1849, to make a will.

The defendant admitted that the plaintiff was heir-at-law of the person last seised, and claimed as devisee, and insisted that he was entitled to begin, which was conceded.(*a*) A will was then produced; and, after proving the execution of it, as required by the statute 7 W. 4 & 1 Vict. c. 26, the defendant's counsel called witnesses to prove the testator's competency.

Evidence was then given on the part of the plaintiff, to impeach the competency of the testator; and it was sought to be shown that he had been incompetent à nativitate, and also that, if ever capable of making a will, he had from habitual and incessant drunkenness rendered himself incapable.

The learned Baron, in leaving the case to the jury, told them that the heir-at-law was entitled to recover unless a will was proved: but that, when a will was *produced, and the execution of it proved, the law presumed sanity, and therefore the burthen of proof was shifted; and that the devisee must prevail, unless the heir-at-law established the incompetency of the testator; and that, if the evidence was such as to make it a measuring cast, and leave them in doubt, they ought to find for the defendant. [*88

The jury returned a verdict for the defendant.

Grove, Q. C., in Easter Term last, obtained a rule nisi for a new trial, on the grounds of misdirection and that the verdict was against evidence, and also upon affidavits imputing partiality and misconduct to the jury. He submitted, upon the authority of Harwood *v.* Baker, 3 Moore's P. C. 282, that the learned Baron was wrong in laying it down that the burthen of proof of incompetency lay on the plaintiff. As to the alleged misconduct of the jury, he referred to Metcalf *v.* Green, Cro. Eliz. 189; Co. Litt. 227 b; Hughes *v.* Budd, 8 Dowl. P. C. 315; Morris *v.* Vivian, 10 M. & W. 137.†

John Evans, Q. C., *Welsby*, and *Coxon*, on a former day, showed cause.—The summing-up of the learned Baron was perfectly correct; for, all the authorities lay it down that the burthen of proving the incompetency of the testator lay on the party impeaching the will. In 1 Williams on Executors, 5th edit. 18, it is said: "If a party impeach the validity of a will on account of a supposed incapacity of mind in the testator, it will be incumbent on such party to establish such incapacity by the clearest and most satisfactory proofs. The burthen of proof rests upon the person attempting to invalidate what on its face purports to be a legal act: 2 Phill. Evid., 7th edit. 293. *Sanity must be presumed till the contrary is shown:* Groom *v.* Thomas, 2 Hagg. 434. Hence, if there is no evidence *of insanity at the time of giving the instructions for a will, the commission of suicide three days after will not invalidate the instrument, by raising an inference of previous derangement:" Burrowes [*89

(*a*) See Doe d. Bather *v.* Brayne, 5 C. B. 655 (E. C. L. R. vol. 57).

v. Burrowes, 1 Hagg. 109: see also Hoby v. Hoby, 1 Hagg. 146. The learned Baron, in substance, told the jury that the heir-at-law was entitled to recover, unless a will was proved; but that, when a will was produced, and the execution of it proved, the law presumed sanity, and therefore the burthen of proof was shifted, and that the devisee must prevail unless the heir-at-law established the incompetency of the testator; and that, if the evidence was such as to make it a measuring cast, and leave them in doubt, they ought to find for the defendant. [CRESSWELL, J.—The latter part amounts to this,—if you cannot tell on which side the evidence preponderates, find for the defendant.] It was for the plaintiff to establish his case: if he failed to satisfy the jury of the insanity of the testator, the defendant was entitled to succeed. In The Attorney-General v. Parnther, 3 Bro. C. C. 441, Lord Thurlow, C., thus lays down the rule:—"If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement: if such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alleging such lucid interval, who must show sanity and competence at the period when the act was done, and to which the lucid interval refers; and it certainly is of equal importance that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong and as demonstrative of such fact, as where the object of the proof is to establish derangement. The evidence *90] in such a case, applying to stated intervals, ought to go *to the state and habits of the person, and not to the accidental interview of any individual, or to the degree of self-possession in any particular act; for, from an act with reference to certain circumstances, and which does not of itself mark the restriction of that mind which is deemed necessary, in general, to the disposition and management of affairs, it were certainly extremely dangerous to draw a conclusion so general as that the party who had confessedly before laboured under a mental derangement, was capable of doing acts binding on himself and others." So, in Groom v. Thomas, 2 Hagg. Ec. 433, Sir John Nicholl says: "The point in this case is, the sanity or insanity of the testatrix,—a sort of case which always depends on its own particular circumstances. The principle of law applicable to such a question admits of no controversy. Every person is presumed to be sane until it is shown that he has become insane: the presumption then changes; it is presumed that he continues of unsound mind, and the party setting up any instrument executed after insanity has manifested itself, has the burthen of proof cast upon him; he must show recovery, and he must show not merely that the party whose act is the subject of inquiry was restored to a state of calmness, and to the ability of holding rational conversation on some topics, but that his mind, having shaken off all disease, was again become perfect, was sound upon all subjects, and that no delusion remained." The same doctrine is laid down in Professor Greenleaf's treatise on the law of evidence, 7th edit. §§ 42, 689. In Cartwright v. Cartwright, 1 Phillim. 100, Sir W. Wynne says:—"I take it the rule of the law of England is the rule of the civil law, as laid down in the second book of the Institutes (Lib. 2, tit. 12, § 2), 'Furiosi autem si per id tempus fecerint testamentum quo furor eorum intermissus est, jure

testati esse videntur." There is no kind of doubt *of it; and it has been admitted that is the principle. If you can establish that [*91 the party afflicted habitually by a malady of mind has intermissions, and if there was an intermission of the disorder at the time of the act, that being proved is sufficient, and the general habitual insanity will not affect it: but the effect of it is this,—it inverts the order of proof and of presumption, for, until proof of habitual insanity is made, the presumption is that the party agent, like all human creatures, was rational: but, where an habitual insanity in the mind of the person who does the act is established, there the party who would take advantage of the fact of an interval of reason, must prove it; so that, in all these cases, the question is, whether, admitting habitual insanity, there was a lucid interval or not to do that act." The rule is the same in the American courts. In Brooks *v.* Barrett, 7 Pickering 94, it was held, that, a will being proved primâ facie by the statute of evidence, the burthen of proof is on the party objecting to its allowance on the ground of insanity, to show that the testator was not of sound mind: and, if the evidence is doubtful, the *presumption of law* in favour of sanity is to have its effect. [CRESSWELL, J.—The onus lay on the defendants, who set up the devise, to prove that the will was made by a person of sound disposing mind. You say that was satisfied by the presumption that every man is sane until the contrary is proved?] Exactly so. [CROWDER, J.—Could it be correct to tell the jury, that, if they have a doubt about it, after taking into consideration the presumption of sanity, they must still find in favor of the will?] The competency of the party is a presumption of law. [CROWDER, J.—What have the jury to do with presumptions of law? WILLIAMS, J.—Is it a presumption of law or a presumption of fact?] It is submitted that it is a presumption of law. All the authorities show that *incompetency *must be proved.* [CRESSWELL, J.—You contend that it lies on the party who seeks to defeat the [*92 will, by evidence to rebut the presumption of competency. WILLES, J.—The question is, whether the jury must not be satisfied that the testator is competent.] The case of Bremer *v.* Freeman, 1 Deane's Eccl. R. 192,—which was a question as to the capacity of an English subject domiciled in France to make a will according to the law of this country,—has some bearing upon this case.

As to the alleged misconduct of the jury, affidavits were produced which fully answered those upon which the rule was founded.

Grove, Q. C., *Beavan*, and *M'Intyre*, in support of the rule, insisted that the learned Baron misdirected the jury, in telling them that the onus lay on the plaintiff to establish the incompetency of the testator; relying mainly upon the cases of Barry *v.* Butlin, 2 Moore's P. C. 481, and Harwood *v.* Baker, 3 Moore's P. C. 282. In the former of these cases, it is stated by Parke, B., that the onus probandi lies in every case on the party propounding a will, and that he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator. And in Harwood *v.* Baker, Erskine, J., delivering the judgment of the court, says: "Their lordships are of opinion, that, in order to constitute a sound disposing mind, the testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of

the claims of others whom by his will he is excluding from all participation in that property; and that the protection of the law is in no cases more needed than in those where the mind has been too much
*93] *enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration; and therefore the question which their lordships propose to decide in this case, is, not whether Mr. Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share in his property. If he had not the capacity required, the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice might cast some light upon the question as to his capacity."

Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court:—(*a*)

This was an ejectment tried before Bramwell, B., at the last Chester Assizes. The defendant admitted that the plaintiff was heir-at-law of the person last seised, and claimed as devisee, and insisted upon the right to begin, which was granted. His counsel then produced a will, and, after proving the execution of it, as required by the statute 7 W. 4 & 1 Vict. c. 26, called witnesses to prove the competency of the testator. The plaintiff then gave evidence to impeach his competency, and endea-
*94] voured to show that *he had been incompetent à nativitate. The learned judge, in summing up, told the jury that the heir-at-law was entitled to recover unless a will was proved; but that, when a will was produced, and the execution of it proved, the law presumed sanity, and therefore the burthen of proof was shifted; and that the devisee must prevail, unless the heir-at-law established the incompetency of the testator; and that, if the evidence was such as to make it a measuring cast, and leave them in doubt, they ought to find for the defendant. A verdict having been found for the defendant, a rule nisi for a new trial was granted in Easter Term, it being alleged that the learned judge misdirected the jury.

The question was argued before us after last term; and some cases were cited in which it has been said that sanity is presumed, and that the onus of proof is on him who disputes it. The cases principally relied on, were, The Attorney-General *v.* Parnther, 3 Bro. Ch. Ca. 441, Groom *v.* Thomas, 2 Hagg. Eccl. Rep. 434, and Brooks *v.* Barrett, 7 Pickering's U. S. Rep. 94; and a passage in Professor Greenleaf's treatise on evidence was also relied on.

The case of The Attorney-General *v.* Parnther was cited for the following passage in the judgment of the Lord Chancellor: "If derangement be alleged, it is clearly incumbent on the party alleging it to prove such derangement: if such derangement be proved, or be admitted to have existed at any particular period, but a lucid interval be alleged to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alleging such lucid interval, who must

(*a*) The case was argued before Cresswell, J., Williams, J., Crowder, J., and Willes, J.

show competence at the period when the act was done, and to which the lucid interval refers." If that is correct,—and we see no reason to dispute it,—the converse also is true, that he who alleges competency must prove it. Now, he who relies on a will in *opposition to the [*95 title of the heir-at-law, must allege that it is the will of a person of sound and disposing mind: he must therefore prove it. The case of Groom *v.* Thomas, 2 Hagg. Eccl. Rep. 434, was in circumstances very similar. The testator was admitted to have been sane, and afterwards insane; and there the court held, that the party propounding a will executed after the period when the testator was admitted to have become insane, was bound to prove sanity. The decision, therefore, was no authority for the defendant in this case. It was cited for the principle laid down by Sir John Nicholl,—"Every person is presumed to be sane, until it is shown that he has become insane: the presumption then changes; it is presumed that he *continues* of unsound mind; and the party setting up any instrument [executed] after insanity has manifested itself, has the burthen of proof cast upon him; he must show recovery." That is perfectly correct: but the learned judge of the Ecclesiastical court was evidently dealing with a case of admitted original sanity, then of proved insanity; and it has no application to a case where capacity was never admitted: nor was he affecting to state the precise nature and extent of the presumption to be made in favour of sanity. Reliance was also placed on two passages in the very learned work of the late Professor Greenleaf upon the law of evidence. In § 42 of the first volume (7th edit.), he says: "Every man is presumed to be of sane mind until the contrary is shown:" and for this he refers to The Attorney-General *v.* Parnther, and Hale's Pleas of the Crown 30. It therefore carries the case no further. The rule in criminal cases depends upon different considerations. Again, under the title "Wills," in § 689, the learned professor writes,—"In regard to insanity, or want of sufficient soundness of mind, we have heretofore seen, that, though in the probate of a will, as the real issue *is, whether there is a valid will or not, the [*96 executor is considered as holding the affirmative, and therefore may seem bound affirmatively to prove the sanity of the testator, yet we have also seen that the law itself presumes every man to be of sane mind until the contrary is shown:" and he refers to the passage before mentioned, to a passage under title "Insanity," § 373 (which relates to the responsibility of a party for his actions), and to Brooks *v.* Barrett, 7 Pickering's Rep. 94. He adds,—"The burthen of proving unsoundness or imbecility of mind in the testator is therefore on the party impeaching the validity of the will for this cause." If the learned professor, by this passage, means that the competency of a testator is to be assumed until it is impeached by evidence, we agree with him: but, if he means that a will must be assumed to be valid, as made by a competent testator, unless the court or jury who have to decide upon it are convinced that he was incompetent, we think it is not in accordance with the English authorities on the subject. The professor says that the competency of a testator is a presumption of law, not of fact.

On this doctrine of presumptions there is a very learned chapter in Starkie on Evidence. He divides presumptions into presumptions of law, which are altogether artificial; presumptions of law and fact, which are of a mixed character (being also artificial presumptions, but to be

found by juries, being recognised and warranted by the law as the proper inferences to be made by juries under particular circumstances); and natural presumptions, or presumptions of mere fact. The presumption of sanity cannot, we think, be treated as a merely artificial or legal presumption, but, at the utmost, as a presumption of law and fact, that is, an inference to be made by a jury from the absence of evidence to show
*97] that a party does not enjoy that *soundness which experience proves to be the general condition of the human mind. But, in such cases, when evidence is laid before a jury, they must decide according to what they believe to be the truth: and, where a will is set up as a valid will, a jury ought not to pronounce it to be so, unless they are convinced of the affirmative. In another passage, Mr. Starkie speaks of the presumption of sanity in a testator as a presumption of fact.

On the other hand, the counsel in support of the rule called our attention to Barry *v.* Butlin, 2 Moore's P. C. 481, where Parke, B., stated as the indisputable rule of law that the onus probandi lies in every case on the party propounding a will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator; and to Harwood *v.* Baker, 3 Moore's P. C. 282. In this latter case, a will had been propounded in the Prerogative Court of Canterbury. The attesting witnesses were examined, and several others on either side. The judge of that court by his decree pronounced against the force and validity of the pretended will, upon the ground that the evidence adduced was not sufficient to prove that the deceased was a capable testator. Against this decree the party propounding the will appealed. The Judicial Committee dismissed the appeal, "because the party propounding the will had not satisfactorily proved, as he was bound to do, that the paper in question did contain the last will and testament of the deceased." In neither of these cases was any weight given to the presumption of sanity unconnected with the evidence.

Some very valuable observations on this subject are to be found in the judgment of Lord Brougham in Waring *v.* Waring, 6 Moore's P. C. 355: "The burthen of proof," says his Lordship, "often shifts about in the progress of the cause, accordingly as the successive steps of the
*98] inquiry, by leading to inferences decisive until *rebutted, cast on the one or the other party the necessity of protecting himself from the consequences of such inferences. Nor can anything be less profitable as a guide to our ultimate judgment, than the assertion, which all parties are so ready to put forward severally, that, in the question under consideration, the proof is on the other side. Thus, no doubt, he who propounds a latter will, undertakes to satisfy the court of probate that the testator made it, and was of sound and disposing mind. But very slight proof of this, where the factum is regular, will suffice; and they who impeach the instrument must produce their proofs, should the party actor (the party propounding) choose to rest satisfied with his primâ facie case after an issue tendered against him. In this case, the proof has shifted to the impugner; but his case may easily shift it back again." The result must be the same where the party propounding does not rely on a primâ facie case, but gives the whole of his proofs in the first instance. The onus remains on him throughout; and the court or jury who have to decide the question in dispute must decide upon the whole

of the evidence so given: and if it does not satisfy them that the will is valid, they ought to pronounce against it.

If, indeed, a will, not irrational on the face of it, is produced before a jury, and the execution of it proved, and no other evidence is offered, the jury would be properly told that they ought to find for the will: and, if the party opposing the will gives some evidence of incompetency, the jury may, nevertheless, if it does not disturb their belief in the competency of the testator, find in favour of the will: and in each case the presumption in favour of competency would prevail. But that is not a mere presumption of law: and, when the whole matter is before the jury on evidence given on both sides, they ought not to affirm that a document is *the will of a competent testator, unless they believe that it really is so. [*99

The result is, that the rule for a new trial must be made absolute.

Rule absolute.

Nov. 5.—The same cause was tried again at the Summer Assizes at Chester, in 1857, before Cockburn, C. J., and occupied six days.

The defendant's counsel, as before, began by proving the execution of the will under which he claimed, and by calling a great number of witnesses for the purpose of showing, that, although the testator had been a person of intemperate habits, he had latterly much reformed, and was at the date of the will perfectly competent.

Amongst others, a witness was called who spoke to declarations made by the testator as to the nature and amount of the property which he took under his father's will.

The will of the testator's father was then tendered in evidence, as well for the purpose of showing the father's opinion as to his son's capacity to manage property, as for the purpose of corroborating the statements of the son as to what he took under that will.

This evidence was objected to as inadmissible; and, the Lord Chief Justice intimating some doubt about it, the defendant's counsel withdrew it.

*A large body of evidence was then given on the part of the plaintiff, as to the conduct and habits of the testator, from his boyhood down to the time of his death, showing that for many years he had been addicted to habits of intemperance and debauchery to such an extent as wholly to enervate and destroy the small amount of mind he had once possessed. [*100

The Lord Chief Justice, in his summing-up, which occupied seven hours, went carefully through the evidence,—observing, in passing, upon the circumstance of the plaintiff's counsel having objected to the admissibility of the will of the testator's father, and to the fact of its being in court, and not called for on the part of the plaintiff, which it probably would have been if the representation proved to have been made as to its contents by the testator (the son) had not been correct,—and, adverting to the rule of law laid down in the judgment of this court upon the former occasion, he left the case to the jury to determine upon the balance of testimony on the one side and on the other.

The jury again returned a verdict for the defendant.

Grove, Q. C. (with whom was *Beavan*), in the following Michaelmas Term, moved for a new trial, on the ground of misdirection.—The first ground of objection to the summing up, is, that the jury were invited to

draw an inference unfavourable to the plaintiff, from the fact of his counsel having objected to the reception of a piece of evidence which the learned judge had ruled to be inadmissible. [COCKBURN, C. J.—The will of the testator's father was offered by Mr. Evans for the purpose of showing that the father, by leaving his property to his son, intimated his opinion as to his capacity to manage his affairs. I thought it inadmissible.] It was also tendered for the purpose of showing that the testator well knew the nature and extent of the property *101] *which he took under it. [CROWDER, J.—I must confess I do not see why it was not admissible. COCKBURN, C. J.—I told the jury that they might fairly infer, as a matter of fact, from the plaintiff's objection to its reception, and also from the circumstance of the plaintiff's counsel abstaining from producing it, though in court, that the will, if produced, would show that the testator correctly apprehended the nature of the dispositions contained in it; and that the fact of his giving a correct account of what he took under that will was cogent evidence to rebut the presumption of insanity. I did not put it to them as a matter of law.] The will having been tendered, objected to, and withdrawn, it should have been considered as wholly out of the question. It was inviting the jury to draw an inference of fact from the circumstance of counsel having successfully resisted the introduction of a piece of evidence which was inadmissible,—in short, it was giving effect to that which was not legal evidence. [WILLES, J.—It seems to me that my Lord would hardly have done justice to the defendant if he had abstained from making the remarks he did upon that part of the case. CROWDER, J.—It is every day's practice, where a person is present in court who could speak to a matter in controversy, and who is not called to tell the jury that they may infer that his evidence, if he were called, would probably be unfavourable to the party who ought to have called him.] That, it is submitted, is not quite this case. If the will of the testator's father was inadmissible,—which it must now be assumed to have been,—it could not properly form part of the instruction to the jury. The closing remarks, too, of his Lordship's summing up were eminently calculated to distract the attention of the jury, and to withdraw their minds from the real point of time to which their consideration should be addressed. [COCKBURN, C. J.—The way in which I *102] *left the case to the jury was substantially as follows:—I told them that the plaintiff would be entitled to their verdict, unless either of the wills executed by the testator should stand good; which latter question entirely depended on the capacity of the testator to make a will at the time of executing both or either of these wills. I explained to them, that, as the case stood before them, the burden of proof was on the defendant, the devisee; and that, to entitle himself to the verdict, it was for him to satisfy the jury of the competency of the testator. I read to the jury on this point the language of this court in its recent judgment in this case. But I told them, that, as the two wills (of 1843 and 1845) were in substance the same, if they, the jury, were satisfied, that, at the time of executing either of them, the testator was competent, the defendant would be entitled to their verdict. I said this, because strong observations had been made to the jury by the plaintiff's counsel as to the presence of the defendant, and its probable effect and influence, at the making of the will of 1845; whereas, at the making of the will of

1843, the testator had gone to the attorney's office without the defendant, attended only by a servant. In observing on what constituted capacity to make a will, I adopted the doctrine contended for by the plaintiff's counsel on the authority of the case of Harwood *v.* Baker, 3 Moore's P. C. 282, viz., that a testator must not only know that he is disposing of his property by a testamentary instrument, but must be capable of understanding the nature and extent of the property of which he is disposing, the manner in which he is disposing of it, and the claims of those who have legitimate claims upon him in the final disposition of his property. I desired the jury to apply this principle to the case before them. In commenting upon the evidence, I divided the history of the testator into three periods,—*the first, from his boyhood to the time he left his father's house, in 1835, and went to live with his aunt Cope,—the second, that during which he lived away from home, till, after the death of his father, in 1842, he went to live with the defendant at Speerston Hall,—the third, from his so going to live with the defendant, till his death, in 1849. I pointed out to the jury the conflict of evidence as to the mental powers and condition of the testator during the first of these periods. I pointed out to them, that, as to the second, the evidence seemed to be all one way, and that there could be no doubt that during that period the testator was utterly lost, both in mind and body, from habitual and incessant drunkenness, and, if ever capable, was then reduced to a state of utter incapacity; and I advised them, unless they believed that in the third period the testator had (as was contended for by the defendant, and endeavoured to be established by his evidence) renounced, in a great degree, his habits of debauchery, and thereby recovered his mental powers in a sufficient degree to be capable of making a will when these wills were executed, they should find against the defendant. I called the attention of the jury in detail to the evidence on both sides as to this latter period, comparing it as I went along. I observed on the evidence as to the statements made by the testator at various times, and particularly on his death-bed, as to the manner in which he had disposed of his property; observing, that, if the jury believed this evidence, as the statements so made by the testator corresponded with the disposition in fact made by the will, they were calculated to throw back light on the period at which the wills were executed, and to afford means of inferring what was the state of his competency at that period.] That was calculated to divert the minds of the jury from the important period, viz., the time of making the will. [COCKBURN, C. J.—The *jury were perfectly alive to the fact that the date of the will was the important period for their consideration. [*103 [*104

WILLIAMS, J.—I am of opinion that there was no misdirection in this case, in the proper sense of the word. The Lord Chief Justice appears, in going through the evidence, to have very properly reminded the jury of the circumstances under which it was given, making remarks thereon that would naturally emanate from any mind of ordinary shrewdness.

CROWDER, J.—I also think there was no misdirection in the way in which the case was presented to the jury. As to the first point, I do not find that any law was laid down by my Lord. It is said that the jury were improperly told that they might draw an inference from evidence which was ruled to be inadmissible. It appears to me that the observations of the Lord Chief Justice were very fair and proper obser-

vations upon the fact of a piece of evidence having been offered on the part of the defendant, and withdrawn upon an objection taken to its admissibility by the other side. The will of the testator's father was in court; it was not put forward for the purpose of contradicting anything proved on the part of the plaintiff, but merely for the purpose of corroborating the declarations which the testator had made as to the interest which he took under it. It was a thing from which the jury might fairly draw an inference in the defendant's favour. I see nothing like a misdirection in point of law. And as to the latter part of the summing-up which is objected to, my Lord has explained the way in which he left the case, referring to the several periods of the life of the testator. I see nothing in the observations he made upon the evidence that was at all calculated to mislead the jury, or to induce them, as is now suggested,
*105] to think that the *question they had to determine, was, the state and condition of the testator's mind at the time of his death. Upon the whole I agree that there ought to be no rule.

WILLES, J.—I am entirely of the same opinion. Mr. *Grove* complains that he has sustained prejudice from an objection successfully taken by him at the trial. I certainly should be very sorry that a party should sustain prejudice or inconvenience from taking a proper objection, and one upon which he was entitled to succeed. But, though it has been very ingeniously put by Mr. *Grove*, it seems to me that what he now complains of has nothing to do with the objection. The question which the jury had to determine, was, whether the testator was competent to make a will. Now, it appears that he had given a substantially correct and connected account of the disposition of his father's property. That clearly was very good evidence to show the state of his mind. The will of his father was in court, and might have been inspected and put in by the plaintiff to show that that statement was untrue. The plaintiff did not put it in: and, when it was offered as evidence on the part of the defendant, it was objected to, and withdrawn. What was the fair and natural inference to be drawn from that? Why clearly that the plaintiff did not think it worth while to put it in, because it would not contradict the evidence which the defendant had given. The point, therefore, stands quite apart from the objection to the admissibility of the evidence. I own my opinion is that the objection ought not to have prevailed. I think it was perfectly competent to the defendant to put in the will, for the purpose of showing that the account which the testator had given of its contents was correct. And there can be little doubt, that, if there had been any substantial variance between that
*106] document and the account which the testator gave *of it, the plaintiff's counsel would have put it in. As to the other point, the part of the summing up to which that objection applies seems to me to be nothing more than a mode of inviting the attention of the jury to the question whether in what is called the third period of the testator's life he was aware of the manner in which his will had been framed at an earlier period. The fact of his being sane and collected at that time was certainly more consistent with sanity at the period alluded to, than with the theory attempted to be set up on the part of the plaintiff. I cannot see any impropriety in the observations of the Lord Chief Justice in this respect. Upon neither ground, therefore, do I think there ought to be a rule. Rule refused.

THOMAS BECK Y CAHILL and BERNARDO VELASCO FERNANDEZ, Executors of LUCAS BECK, deceased, *v.* DAWSON.

July 4.

A., a merchant at Seville, wrote to B., his agent at Liverpool, desiring him to insure a cargo of fruit to that place. B., acting bonâ fide, instructed one C., a person who had occasionally acted as A.'s agent in London, to get a policy effected there. C. for that purpose employed one D., an insurance-broker, who effected the insurance in his own name, and afterwards received the amount of a loss from the underwriters, but retained it, claiming a lien for a debt due to him from C. in respect of premiums and commission on former transactions.

In an action by A. against B. for negligently omitting to effect a good and available insurance upon the cargo, and neglecting to take steps to get the money, and for money had and received, the judge,—treating it as immaterial whether the letter of instructions from B. to C. had been shown to D. or not,—ruled that B. had violated his duty as agent, by employing another agent in London, instead of effecting the policy himself, and that he was responsible for the whole amount received from the underwriters by D.:—Held, that this was not the true measure of damages; for, that, if B.'s letter of instructions had been shown to D. at the time he was employed to effect the policy, he could acquire no lien upon the proceeds for the debt due to him from C., and his unlawful detention of the money could not give A. a right of action against B. for the whole amount so received by D., though B. might be liable for some nominal damages in respect of the breach of his duty as agent; and therefore that fact ought to have been ascertained.

But, *quære* whether the conduct of B. did amount to a breach of duty?

THIS was an action against an agent for negligence in effecting a policy of insurance.

*The declaration stated, that, in the lifetime of Lucas Beck, [*107 deceased, the said Lucas Beck retained the defendant as his agent for hire and reward in that behalf to effect a good and available insurance against certain perils on a certain cargo, that is to say, a cargo of oranges and figs, shipped by the said testator, to wit, from Seville to Liverpool, and consigned by the said testator to the defendant for sale or return, upon the terms that the defendant should use due and reasonable care and diligence in and about effecting the said insurance, and in taking all necessary steps to enable the said testator to obtain payment of the moneys which might become due in the event of the loss of the said cargo by any of the perils insured against, and should in the event of the inability of the defendant to effect the said insurance give notice thereof to the testator within a reasonable time in that behalf; and the defendant then accepted the said retainer, and then, in consideration of the premises, promised the said testator duly and faithfully to discharge his duty as such agent in the premises: And the plaintiffs, as such executors as aforesaid, said, that, although the said testator, and the plaintiffs as such executors as aforesaid, had respectively done all things, and though all things had happened, and all times had elapsed, necessary to entitle the said testator in his lifetime, and the plaintiffs as such executors as aforesaid, to a performance by the defendant of his said promise, and to sue the defendant for the breaches thereof thereinafter mentioned; and although the defendant might and could and ought to have effected such an insurance in the lifetime of the said Lucas Beck; yet the defendant broke his said promise in this, to wit, that he did not nor would use due and reasonable care and diligence in and about effecting the said insurance, but *carelessly and negligently omitted to effect any good or available insurance upon* *the said cargo agreeably to his said promise, nor did the defend- [*108 ant give any notice to the said testator in his lifetime, or to the

plaintiffs as such executors as aforesaid, of his inability to effect the same: And the defendant further disregarded his promise, in this, *that, although he might and could and ought to have taken steps*, the same being necessary steps, *to enable the said testator*, and the plaintiffs as such executors aforesaid, *to obtain payment of the moneys due and payable in respect of the loss* of the said cargo by certain of the perils insured against; *yet the defendant* did not nor would use all due and reasonable care and diligence in and about taking such steps, but *wholly neglected so to do:* Averment, that the said cargo so consigned to the defendant as aforesaid was in the lifetime of the said testator wholly lost on the said voyage by divers of the perils against which the defendant was retained to effect an insurance as aforesaid; whereby the testator was deprived of the moneys which he ought to have received by reason of such insurance, and his personal estate was thereby damnified and lessened, and the plaintiffs as such executors as aforesaid had been thereby wholly deprived of the amount which ought to have been received by reason of such insurance, to wit, 300*l.*

There was also a count in trover for the policy, and a count for money received by the defendant for the use of the plaintiffs as executors.

The defendant pleaded,—first, that the plaintiffs were not executors of the last will and testament of Lucas Beck, deceased, as alleged,—secondly, to the first count, that the defendant did not promise as alleged,—thirdly, to the first count, that the said Lucas Beck did not retain the defendant as alleged, upon such terms as alleged, nor did the defendant accept such retainer, as alleged,—fourthly, to the first count, a denial of the alleged breaches of promise and each of them,—fifthly, to *the first breach in the first count, that the defendant could not have effected such insurance in the lifetime of the said Lucas Beck, as alleged,—sixthly, to the second breach, that the defendant could not have taken such steps to enable the testator, or the plaintiffs as such executors, to obtain payment of the moneys due or payable in respect of the loss of the cargo, as alleged,—seventhly, to the first count, that, after the making of the said promise, and before any breach thereof by the defendant, the said Lucas Beck in his lifetime discharged the defendant from his promise and from the performance of the same,—eighthly, to the second count, not guilty,—ninthly, to the second count, that the said goods were not the goods of the plaintiffs as such executors, as alleged,—tenthly, to the first and second counts, that the defendant did what was complained of by the leave of the said Lucas Beck in his lifetime, and of the plaintiffs as such executors as aforesaid since the death of the said Lucas Beck, respectively,—eleventhly, as to the residue of the declaration, never indebted,—twelfthly, to the residue of the declaration, payment before action. Issue thereon.

*109]

The cause was tried before Willes, J., at the sittings in London after Trinity Term, 1856. The facts which appeared in evidence were as follows:—The plaintiffs' testator, who was a merchant carrying on business at Seville, under the firm of Cahill, White & Beck, having in November, 1854, consigned a cargo of fruit to Liverpool, by the ship Walburton, by letters of the 3d and 7th of that month instructed the defendant, his agent there, to effect an insurance thereon for 300*l.* Finding that he could not effect a policy at Liverpool upon such good terms as in Lon-

don, the defendant sent directions to one Lewis, a commission agent, to get the policy effected there. Lewis employed for that purpose one Naile, an insurance broker. Naile effected the *insurance in his own name; and, an average loss having been incurred, the underwriters, after considerable delay in adjusting the amount, paid the loss to Naile, who claimed to be entitled to set off the sum so received by him against premiums and commission due to him from Lewis upon other transactions. [*110

There was a conflict of evidence as to whether Lewis, at the time he instructed Naile to get the policy effected, showed him the letter of instructions he had received from the defendant, or informed him that he was acting as agent in the transaction. Lewis swore that he did: Naile denied it: but, at all events, it was pretty clear that Naile became acquainted with the fact before he received the money from the underwriters.

It appeared that Lewis had on former occasions been employed by Cahill & Co., as their agent in London in the charter of ships and effecting insurances and sales, and that the Walburton had been chartered by him, but that they had not recently employed him in any business of importance.

On the part of the defendant it was insisted that the defendant had been guilty of no breach of duty in employing Lewis to carry out the instructions of his principal, and that Lewis had only adopted the usual course of business in employing an insurance-broker, and that the fact of Naile, the insurance-broker, having caused the policy to be effected in his own name did not make the instrument less good and available, or in any way affect the right of the principals to recover against the underwriters for a loss, nor could the principals be prejudiced by Naile's improper claim of lien. It was further insisted, that, assuming that the course pursued by the defendant was at first unauthorized by the instructions he received from his principals, the latter had subsequently ratified it; and in support of this the following correspondence was put in:—

*A letter of the 7th of May, 1855, from Cahill & Co. to the defendant,— [*111

"We were duly favoured with yours 25th ult., in answer to three letters of ours on the subject of the account of insurance on the Walburton's cargo. We are sorry to see nothing had been done since your last advices; and, as to Mr. Lewis, he had not written us a single word on the subject, nor is it likely he should, as it was an affair entirely committed by us to your care, and not to his. We beg, therefore, once more earnestly to request of you to consider that it is you, not Mr. Lewis, whom we intrusted with the insurance of the Walburton's cargo, and that consequently it is from you alone, and not from him, that we hope and expect shortly to receive the termination and account of this so long unsettled affair."

A further letter of the 29th of May, from Cahill & Co. to the defendant,—

"We are anxious to get this matter settled, and, *not having a single word from Mr. Lewis on the subject*, did not know what to attribute so long a delay to, unless it was to be attributed to dilatoriness on his part; and therefore it was that we expressed a wish to have this affair wound up; and *our wish to have it settled through your mediation, was, to avoid*

complication, which would undoubtedly arise should the result of the insurance come through a different person from that to whom the cargo was consigned per Walburton. We hope you will soon obtain the final winding up of this affair from Mr. Lewis."

A further letter of the 24th of July, from Cahill & Co. to the defendant,—

"Referring you to our annexed circular, and deprived of your esteemed favours since our last (29th May), we beg now to say that we were shortly afterwards addressed by Mr. Lewis on the subject of the
*112] insurance *on the Walburton's cargo, which he said had not been arranged, owing to some difficulties which had occurred; but he expected shortly to wind it up. He has since, it appears, been ill, but is well again, and attending to business. We pray, therefore, you will once more urge him to finish this tiresome business as soon as possible, as we are now fast approaching to another season, without having seen an end of the first cargo of fruit shipped last season at our port."

A further letter of the 1st of September, from Cahill & Co. to the defendant,—

"We were in receipt of your esteemed favour 25th July, having had the pleasure of addressing you on 24th same, to which, and to our former letters of the 7th and 29th May, we beg to refer you on the subject of Walburton's cargo. We must really say that it is a very unusual occurrence that has taken place in this business. *We intrusted you with the insurance on this cargo,* and a year almost has elapsed without its winding up, merely because *the person you employed as your agent in London for the purpose* does not choose to give any account of it. There certainly is some means of forcing him to do so, if letters are not sufficient. If so, pray employ it, and see if this tiresome business can be concluded."

A further letter of the 10th of November, from Cahill & Co. to the defendant,—

"We confess our inability to read some parts of your esteemed favour, 15th ult., now before us; but will explain our opinion of the case of the Walburton's insurance. *We gave you orders for effecting insurance thereon, and for the purpose you thought proper to avail yourself of some person or persons in London, and now this person or persons refuse to account to you for such insurance.* Now, this is the state of the case;
*113] and we may be allowed to ask, what matters it to us whether *you employ legal or illegal means to force him to come to his senses? *We have nothing to do with him: it was you employed him, not we; and we trust through you to obtain the full amount insured."*

A further letter of the 20th of February, 1856, from Cahill & Co. to the defendants,—

"Your esteemed favour, 13th inst., is before us. In the first place, we will observe, &c., &c. As to the chief object of your letter,—that of your responsibility for the insurance of the Walburton,—not being of same opinion with you, as our previous letters have shown you, we have referred the matter to our friends and agents in London, Messrs. W. M'Andrew & Sons, to arrange with you. In our opinion, your interest would not be prejudiced by paying us the insurance, as in such case you would be substituted in our place to claim it from the broker, who would undoubtedly have to pay all for his unjust detention of funds

which he well knew did not belong to his debtor. By so doing, you would do but justice to us, *as we have had nothing to do with either the broker or Mr. Lewis, but with you;* and we have your acknowledgment of the cargo having been insured. Besides, *Mr. Lewis has not been our agent for the last eight years, nor had the management of any business of ours; so that we cannot be responsible for his acts.*"

Other letters were put in, bearing date in 1848, 1849, and 1850, addressed by Cahill & Co. to the defendant, instructing him to employ Lewis to effect certain insurances for them on cargoes of fruit. One of these letters, dated the 8th of November, 1849, contained the following passage:—"Our mutual friend Thomas R. Lewis, of London, having opened a general policy for one or more cargoes of fruit shipped by us, we this mail order his including therein the amount of this shipment."

*The learned judge was of opinion that the defendant had violated his duty as agent, by employing another agent in London, [*114 instead of effecting the policy himself, and that he was responsible to his principals for the amount received by Naile. He treated it as immaterial whether Lewis had shown his letter of instructions to Naile, or not.

A verdict was taken for the plaintiffs, damages 326*l.*, with leave to the defendant to move to enter the verdict for him, if the court should be of opinion that the learned judge had ruled erroneously.

James Wilde, Q. C., in Michaelmas Term, 1856, accordingly obtained a rule nisi to enter a verdict for the defendant, or for a new trial, "on the ground that the defendant properly executed the orders he received, or that the course taken by him was ratified by the plaintiffs." He submitted that the charge in the declaration was not made out; for, that the defendant had caused a good and available policy to be effected, and that the fact of its having been effected in the name of Naile did not in any degree affect the plaintiffs' right to recover for a loss, the receipt of the money by Naile being a receipt to the use of the persons interested; and that Naile's improper claim of lien could not affect the defendant. He referred to Snook *v.* Davidson, 2 Campb. 217, Westwood *v.* Bell, 4 Campb. 349, and Maanss *v.* Henderson, 1 East 335.

Honyman (with whom was *Byles*, Serjt.), in Trinity Term, showed cause.—The insurance was effected by Naile for Lewis. [CRESSWELL, J.—If Lewis, at the time he employed Naile to get the policy underwritten, disclosed to him that he was acting as agent of another, Naile could acquire no lien upon the proceeds of that policy for premiums and commission due to him from *Lewis upon other transactions: [*115 and, if so, how can it be said that there was not a valid insurance upon the Walburton's cargo?] If it was a material question whether or not Lewis communicated to Naile the letter of instructions he received from Dawson, the defendant's counsel should have asked the learned judge to leave that matter to the jury. The plaintiffs could not have sued either Lewis or Naile; there being no privity between them. The case somewhat resembles Ireland *v.* Thomson, 4 C. B. 149 (E. C. L. R. vol. 56), where it was held, that, where, in consequence of damage to a ship during the voyage, it becomes impossible to prosecute the adventure, the master has authority to sell her for the benefit of all parties interested; and that a person employed by him to superintend the sale, might lawfully pay over the proceeds to him or to his order. Maule,

J., in delivering the judgment of the court, there says: "Whether the action could have been maintained, if the plaintiff, or all those interested in the ship and cargo, had intervened before the money had been paid by the orders of Frazer (the master), it is not necessary to determine. But there are strong reasons for considering the defendant and his partner as the agents of Frazer only, and not accountable to those interested in the ship and cargo, even if they *had* intervened before payment. In a learned work cited on the argument,—Story on Agency, —the author states the rule thus (§ 203, n.): "A sub-agent employed by an agent is in general accountable to the agent only, and not to the principal; for, there is no reciprocity of contract between them:" and this doctrine is supported by several cases which he refers to, amongst which are Stephens *v.* Badcock, 3 B. & Ad. 354 (E. C. L. R. vol. 23), where the court held that a clerk who had received money for his master on account of the plaintiff, was not answerable to the plaintiff, whose *116] remedy was against the master, though the clerk *had not paid the money to him,—Cartwright *v.* Hateley, 1 Ves. jun. 292, where a son, employed under and accountable to his father, was held not to be accountable to his father's principal,—and Pinto *v.* Santos, 5 Taunt. 447 (E. C. L. R. vol. 1), 1 Marsh. 332 (E. C. L. R. vol. 4), (which in its circumstances bears some resemblance to the present case), where it was held that bankers, who had received from an agent the proceeds of a ship which belonged to different persons in different shares, with notice of the party from whom the money was received, and of the rights of those who were entitled to it, were liable to account to the agent only from whom they received the money, notwithstanding the intervention of the plaintiff, who was entitled to the largest share. See also the case of Sims *v.* Brittain, 4 B. & Ad. 375 (E. C. L. R. vol. 4), 1 N. & M. 594 (E. C. L. R. vol. 28), in which the surviving part owners of a ship were considered not entitled to maintain an action for money had and received against persons whom a deceased part owner (who was the ship's husband) had employed to receive and pay money on account of the ship,—on the ground of want of privity between the plaintiffs and the defendants. The principle on which these cases were determined would probably govern the present case, if the circumstances required its application." [COCKBURN, C. J.—Suppose Dawson had employed Naile, how would the matter have stood then?] Possibly in that case the plaintiffs might have had a right of action against Naile: but even then their remedy against Dawson would remain. Under the count for money had and received, inasmuch as the money was received by Naile for Lewis, and the latter is identified with Dawson, the plaintiffs are entitled to insist that Dawson has received the money by or through his agent. The plaintiffs are therefore entitled to retain the verdict on that count.

*117] *James Wilde*, Q. C., and *Tomlinson*, in support of the *rule.— The special count charges the defendant with having negligently omitted to effect a good and available insurance upon the cargo in question, and also with having neglected to take proper steps to obtain payment of the loss from the underwriters. Now, as to the first, it is clear that there has been no default; a good and available policy was effected, for the money was paid in respect of the loss. Then, as to the other part of the charge,—if Naile set up an illegal claim of lien upon the

money, that is not the defendant's fault. That it is the recognised course of dealing to employ an insurance or policy broker, as he is sometimes called, to effect an insurance, is clear: see Arnould on Insurance, 2d edit., Vol. I. p. 117. And the authorities are equally clear, that, although the broker has a lien for his general balance against the person who employs him to effect the policy, where he acts in ignorance that the person so employing him is merely an agent in the transaction, yet, where he knows, or has reason to believe, that he is dealing with one who is only an agent, his lien extends no further than the premiums and commission due in respect of the particular policy: see Snook *v.* Davidson, 2 Campb. 217; Westwood *v.* Bell, 4 Campb. 349; Maanss *v.* Henderson, 1 East 335; Marsh. Ins., 3d edit. 308. If Dawson's letter of instructions to Lewis, therefore, was communicated to Naile, he clearly could have no right to retain the money. [CRESSWELL, J.—The onus probandi lay on you. I apprehend, that, unless it was found that Lewis did communicate to Naile the fact of his being only an agent, there is no defence to the action. You should have required that to be left to the jury.] The whole matter was reserved for the court. [COCKBURN, C. J.—The authority given by the plaintiffs' testator to Dawson primâ facie was, to cause a policy to be effected either in his own (the principal's) name or in that of Dawson. He has done *neither. On the contrary, he employs a third person, who causes the insurance [*118 to be effected in such a way as to confer upon the broker a right to receive, and, for aught that appears, to retain, the money.] It is submitted that Lewis did not enable Naile to receive the money otherwise than to the use of the persons legally entitled to it, viz. the plaintiffs. The fact of Naile, who is bound to pay over the money to the plaintiffs, having omitted to do so, cannot give the latter a cause of action against Dawson. It may be conceded, that, if Dawson had acted upon the instructions of his principals in such a way as to give a third person a *legal* right to intercept the money, he might be open to the charge of having negligently effected the insurance. [COCKBURN, C. J.—Does not the defendant, by putting it into the power of Lewis to cause the policy to be effected in the way he did, contravene his duty to the plaintiffs, and so render himself liable at all events for nominal damages?] Clearly not, unless he gives some person a *legal* right adverse to the interest of his principals. Assuming, however, that Dawson's employment of Lewis was not originally authorized by the testator, the correspondence clearly shows that the act was subsequently ratified by him. The plaintiffs, therefore, cannot now complain that Lewis was improperly put in motion. Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the court:—

This was an action brought by the executors of a merchant who resided at Seville, in Spain, against his agent, who resided at Liverpool, charging him with negligence in effecting a policy of insurance. It appeared that one Beck, a merchant at Seville, had written to the defendant, requesting him to effect an *insurance upon a cargo [*119 of fruit, and that the defendant, thinking it might be effected on more advantageous terms in London than in Liverpool, wrote to one Lewis in London, explaining to him the nature of the order which he had received, and instructing him to effect the policy. Lewis thereupon employed one Naile, an insurance-broker; and there was some contro-

versy at the trial as to whether or not Lewis had shown Naile his letter of instructions. Naile effected the policy, and, a loss having occurred, received the money from the underwriters, but refused to hand it over to the defendant, insisting on a lien as against Lewis in respect of premiums due to him upon other policies. The learned judge who tried the cause treated it as immaterial whether the letter of instructions had been shown to Naile or not; thinking that the defendant had violated his duty as agent, by employing another agent in London, instead of effecting the policy himself, and that he was responsible for the whole amount received by Naile from the underwriters.

The case was argued before us in Trinity Term last upon both points. The question as to how far it was material to show that the letter was communicated, certainly was not determined at the trial. There is some difference of opinion in the court as to whether or not the defendant did in any way violate his duty, by transferring to Lewis the order to effect the policy: but, at all events, we are all of opinion that the true measure of damages was not that which the learned judge stated. This being an action upon the case for negligence, if that letter had been exhibited to Naile, he could have acquired no right to retain the proceeds of the policy for a claim against Lewis, because he would have known that Lewis was acting merely as agent for Dawson; and the unlawful detention of the money by Naile could not give the plaintiffs a *120] right of *action against the defendant for the whole amount so received by Naile, though the defendant might be liable for some nominal damages in respect of the breach of his duty as agent. That question, however, cannot be decided until it is first ascertained whether the letter of instructions sent to Lewis was or was not shown to Naile at the time the order for the insurance was given to him; consequently, there must be a new trial.

This being a point of some considerable importance in the law of principal and agent, the parties may put it in any course for investigation they may consider to be expedient.

Rule absolute accordingly.(a)

(a) The cause went down again, but has not yet (E. T. 1858) been tried.

LOVELL v. SMITH. *June* 25.

A parol agreement for the substitution of a new way for an old prescriptive way, and a consequent discontinuance to use the old way, afford no evidence of an *abandonment* thereof.

THIS was an action brought by the plaintiff to try the right to a footway claimed by him over the defendant's land, in the parish of West Hadden, in the county of Northampton.

The cause was tried before Wightman, J., at the last Assizes at Northampton. The facts were as follows:—In the year 1803, the plaintiff became the occupier of a cottage called West Hadden Cottage, and had occupied it ever since. The defendant's farm,—over part of which the way was claimed,—was between the plaintiff's cottage and the village, and was at that time occupied by one Thomas Whitwell, who

continued in *occupation until Lady-day, 1824. In 1820, Whitwell became owner of the fee; and, from Lady-Day, 1824, the [*121 farm was occupied by one Isaac Lovell (a cousin of the plaintiff). Whitwell, however, continued to reside in the house until October, 1824, when he died, having by his will devised the house and farm to his daughter Mary, then a minor, in fee. She, in July, 1824, being still a minor, married. In 1834, the estate became the property of one William Dunkley, who died some time before February, 1838, having by his will devised the estate to his wife for life, who is still living.

There was abundant evidence of an uninterrupted user of a way over the land in question from the plaintiff's cottage to the village, prior to the year 1812. In 1824, the farm being then in the occupation of Isaac Lovell, by agreement between him and the plaintiff, and with the assent of Whitwell, the then owner of the fee, the direction of the footpath was altered, and a new way made over a portion of the defendant's land, and the old one ceased to be used. The obstruction complained of was in a part of the old line between the plaintiff's land and the point of deviation on the defendant's land.

The plaintiff's case being closed, the defendant's counsel submitted, that, inasmuch as the declaration claimed a way generally, and the particulars pointed at two ways, viz. the original way, and the substituted one, he was entitled to call upon the plaintiff to state which of the two he relied on. To this the learned judge assented.

The plaintiff's counsel thereupon said that he claimed to be entitled to the new or substituted way, by virtue of twenty years' user under the 2 & 3 W. 4, c. 71, § 2: but, that failing, by reason of the disability arising from the infancy and coverture of Mary Whitwell, he submitted that he was entitled to fall back upon his *original prescriptive [*122 right to the old way. He referred to Payne *v.* Shedden, 1 M. & Rob. 382.

For the defendant, it was insisted that there was no evidence to support the claim to the old way by prescription, because the user of it had become impossible by acts of the owner of the soil, acquiesced in by the plaintiff who claimed the right.

The learned judge was of opinion that the disability negatived the plaintiff's claim under the statute in respect of a twenty years' user: and he proposed to put it to the jury whether the prescriptive way had not been abandoned.

The plaintiff's counsel having summed up his evidence, and the defendant's counsel having addressed the jury,—the learned judge left it to them to say, whether the plaintiff had a way by prescription; and, if he had, whether, by agreement between the owner and occupier of the land over which the way claimed ran, and the plaintiff, the person claiming the way, another way was substituted for the old way, and the old one abandoned and extinguished.

The jury having returned a verdict for the defendant,

Field, in Easter Term last, moved for a rule nisi for a new trial on the ground of misdirection,—"first, that there was no evidence to be left to the jury of an abandonment of the right of way claimed,—secondly, in the judge not telling the jury, that, under the circumstances proved in evidence, the non-user of the way was not sufficient to justify them in presuming an abandonment,—thirdly, that the obstruc-

tion was on part of the way which had been immemorially used, and as to which there was no evidence of abandonment;" and also on the ground that the verdict was against evidence. The non-user of the old way
*123] under the *circumstances proved, clearly was no evidence of abandonment. In Payne v. Shedden, 1 M. & Rob. 382, a plea of twenty years' user of a right of way, under the 2 & 3 W. 4, c. 71, was held not to be defeated by proof of an agreed alteration of the line of way, nor by a temporary non-user under an agreement of the parties. Patteson, J., there says: "If there be ten years' enjoyment of a right of way, and then a cessation, under a temporary agreement, for another ten years, yet this may be a sufficient enjoyment of the old right for twenty years, to make it indefeasible under the statute; for, the agreement to suspend the enjoyment of the right does not extinguish, nor is it inconsistent with, the right. So, if, instead of the direct path from A to B, another track over the plaintiff's land, from A to C, and thence to B, had been substituted by a parol agreement of the parties for an indefinite time, yet the user of this substituted line may be considered as substantially an exercise of the old right, and evidence of the continued enjoyment of it." The case thus put is precisely this case. Again, in Hale v. Oldroyd, 14 M. & W. 789,† in case for the diversion of water, the plaintiff alleged in his declaration a reversionary interest in three closes of land, to wit, *three ponds* filled with water, one pond being upon each of the said closes, and a right to the flow of the water into the said closes, for supplying the said ponds in the said closes with water for the watering of cattle. The defendant traversed the right to the flow of the water as alleged. At the trial, it appeared in evidence that the plaintiff had enjoyed an immemorial right to the flow of this water into an ancient pond in one of his closes, but that, above thirty years ago, he made a new pond in each of the three closes, and turned the water so as to supply them, and thenceforth disused the old pond, which was gradually filled with rubbish, and overgrown with grass.
*124] The plaintiff's right in *respect of the three ponds having been defeated by proof of an outstanding life-estate, under the 2 & 3 W. 4, c. 71, § 7,—it was held that he was entitled, under this declaration, to recover in respect of his right to the flow of water to the *old* pond. Parke, B., there says: "The use of the old pond was discontinued only because the plaintiff obtained the same or a greater advantage from the use of the three new ones. *He did not thereby abandon his right; he only exercised it in a different spot; and a substitution of that nature is not an abandonment.* He has a right, therefore, under this declaration, to recover in respect of the old pond." And in Ward v. Ward, 7 Exch. 838,† it was held that an immemorial right of way is not lost by non-user for upwards of twenty years, the user having been discontinued merely by reason of the party's having had a more convenient way. Alderson, B., in the course of the argument in that case, observes: "*The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption.* The right is acquired by adverse enjoyment. The non-user, therefore, must be the consequence of something which is adverse to the user. Here, the owners of the Stubbing Pits did not use the way in question, for the simple reason that they had a more easy and convenient means of access to that part of their property." In

Gale on Easements 380, 381,—after referring to Paine *v.* Shedden, 1 M. & Rob. 382, and Hall *v.* Swift, 6 Scott 167, 4 N. C. 381 (E. C. L. R. vol. 33), Hale *v.* Oldroyd, 14 M. & W. 789,† and Carr *v.* Foster, 3 Q. B. 581 (E. C. L. R. vol. 43), 2 Gale and D. 753, as elucidating the doctrine that "a mere intermittance of the user, or a slight alteration in the mode of enjoyment, when unaccompanied by any intention to renounce the acquisition of a right, does not amount to an abandonment,"—the learned author says: "Where, however, there has not *been a mere cessation to enjoy, but it has been accompanied by [*125 indications of an intention to abandon the right, or, by a disclaimer, there is authority for saying that a shorter period will be sufficient to extinguish the right. Such direct evidence of intention appears to have been treated in the same manner as the similar indications afforded by a change in the status of the dominant tenement. Such non-user, accompanied by confessions that the party had no right, would at all events be strong evidence, and in effect almost conclusive, that he never had any such right:" and he refers to Norbury *v.* Meade, 3 Bligh 211, 241. [CRESSWELL, J.—Here the plaintiff used the new way set out by Isaac Lovell in 1824, not as a way of right, but under a license. The question is, whether there was any evidence of an abandonment of the old way, except so long as he might be permitted to use the new one.] Precisely so. [CROWDER, J.—Was not abandonment a question for the jury?] No doubt: but here there was no evidence of abandonment.

A rule nisi having been granted,

Hayes, Serjt., now showed cause.—He submitted that there was ample evidence to justify the conclusion to which the jury came, that the old way had been abandoned when the new one was set out, that it was purely a question of fact for them, and that the learned judge had properly left it to them; and that, the claim arising out of the twenty years' user of the new or substituted way, under the statute 2 & 3 W. 4, c. 71, s. 2, being by reason of the disability of the owner of the fee out of the question, the cases cited upon the motion were altogether inapplicable.

Field, in support of his rule, was stopped by the court.

*CRESSWELL, J.—I am of opinion that this rule should be made [*126 absolute. The learned judge evidently had his mind diverted from the true question by the contest between the counsel at the trial. The plaintiff at first claimed to be entitled to the new way, by reason of an uninterrupted enjoyment for twenty years, under the 2 & 3 W. 4, c. 71, s. 2. The defendant's counsel having succeeded in inducing the judge to lay that out of the question, the plaintiff's counsel fell back upon his original prescriptive right. Now, there was nothing from which an abandonment of that right could be inferred, except the exercise of the right over the new way; and that clearly was not sufficient.

WILLIAMS, J.—I am of the same opinion. As it now turns out, the case very much resembles that of Roe d. The Earl of Berkley *v.* The Archbishop of York, 6 East 86, where the acceptance of a new lease granted under a special power, and an occupation under it for several years, was held not to operate as a surrender of a former lease, which had in fact been cancelled and given up, so as to prevent the lessee from setting it up again, upon its turning out that the new lease was void by reason of its not having been made in strict accordance with the terms of the power.

WILLES, J.—I am entirely of the same opinion. The facts seem to

have been these,—The plaintiff, having a right of way by prescription, more than thirty years ago agreed with the owner and occupier of the servient tenement that the use of a portion of that way should be discontinued, and a new one, equally convenient to him, should be substituted for it. It is quite obvious that that was done without any intention on the part of the plaintiff to abandon his original right: and the jury were *127] not at liberty to infer an abandonment or *extinguishment, without some evidence of intention. I do not think that this court means to lay down that there *can* be an abandonment of a prescriptive easement like this without a deed, or evidence from which the jury can presume a release of it. It is unnecessary, however, to discuss that on the present occasion, because I agree with the rest of the court in thinking that the facts of this case show clearly that there was no intention on the part of the plaintiff to abandon the way, either legally or popularly. There was no evidence to go to the jury of the old right of way having ever been given up or destroyed.

CRESSWELL, J.—After this intimation of opinion on the part of the court, probably the defendant will hardly think it worth his while to go down again.(a) Rule absolute.

(a) The cause came on to be tried before Erle, J., at the following Spring Assizes, when a compromise was come to,—a juror being withdrawn, and the question as to the costs of the second trial being left to the learned judge, who directed that the plaintiff's costs out of pocket should be paid by the defendant.

*128] *LODER v. KEKULÉ. *July* 4.

In an action for the breach of a contract by delivering goods of a quality inferior to that contracted for, the proper measure of damages is, the difference between the value of goods of the quality contracted for, at the time of the delivery, and the value of the goods then actually delivered,—or their value as ascertained by a resale within a reasonable time: and the fact of the goods having been previously paid for cannot be taken into consideration in estimating the damages.

THE plaintiff in this action sought to recover damages against the defendant for an alleged breach of two contracts, each for the sale of one hundred casks of Russian tallow; the complaint being, the delivery of tallow of a quality inferior to that contracted for.

The first count of the declaration stated, that, in October, 1855, the defendant agreed to sell to the plaintiff, and the plaintiff agreed to buy from the defendant, one hundred casks of Russian prime Ukraine Y. C. tallow, at 58*s.* per cwt. free on board at Dantzic, to be ready for shipment at Dantzic during the month of November, 1855; the defendant to provide ship room on best terms for London; tare to be at the rate and payment to be made in the manner then agreed upon; and the defendant then, in consideration of the premises, promised the plaintiff to perform the said agreement on the defendant's part: Averment, that the said month of November elapsed, and ship room was procurable for London according to the said contract, and a sufficient and proper time for the defendant to have performed the said contract on his part expired, and the plaintiff paid for said tallow according to the said contract,—all which happened before this suit; and that the plaintiff was at all times

ready and willing to accept a shipment of and to receive the tallow according to the said contract, and before this suit performed all conditions and matters precedent or otherwise on his part: Breach, that the defendant did not perform the said contract on his part, and supplied and shipped as and for the said tallow one hundred casks of tallow of which a great part was not Russian prime *Ukraine Y. C. tallow, but was different therefrom, and of much less value, and did not at any time [*129 supply or ship, or have ready for shipment, one hundred casks of Russian prime Ukraine Y. C. tallow; and thereby the plaintiff before this suit sustained great damage by reason of the inferior quality and value of the tallow actually supplied, and by reason of certain freight, insurance, landing, selling, and other charges, duties, and dues incurred and paid by the plaintiff in respect of the same, and by reason of the loss of profit which would have arisen from the supply of tallow according to the contract, and thereby also lost interest upon, and the use of, large sums which he would have obtained from the sale of the tallow, if it had been supplied to him according to the contract.

There was a second count upon a similar contract for one hundred casks of first sort Russian Ukraine Y. C. tallow, at 59*s.* per cwt., and a similar breach.

The defendant pleaded payment into court of 234*l.*; to which the plaintiff replied damages ultrà, whereupon issue was joined.

The cause was tried before Willes, J., at the sittings in London after Trinity Term, 1856. The facts which appeared in evidence were as follows:—In October, 1855, the plaintiff contracted with the defendant to buy of him two parcels of 100 casks each of "Russian prime Ukraine Y. C. tallow," at 58*s.* and 59*s.* per cwt. respectively,—*the price being paid in advance*,—and on the terms stated in the first and second counts of the declaration respectively. The tallow was accordingly shipped on board the Emilie, and arrived in London on the 12th of January, 1856. The unloading of the cargo commenced on the 16th of January, and was finished on the 25th. Upon inspecting the tallow, the plaintiff found that it was very inferior in quality to that which he had contracted for; and in the result it turned out *that, of the two hundred casks, sixteen only were according to contract.(*a*) These the [*130 plaintiff accepted at the contract price; but, as to the remaining 184 casks, a correspondence ensued between the plaintiff and the defendant, the former offering to return the tallow, and demanding back his money, or to accept the tallow with an allowance of 7*s.* per cwt.; the defendant declining to take back the tallow or to make the required allowance. And on the 12th of March the plaintiff sold the 184 casks, in his own name, on account of the defendant.

It appeared that the price of tallow declined considerably in London on the 17th of January, and that it continued to decline until the time of the sale. The value of tallow according to the contract on the 25th of January, when the landing and delivery took place, was 58*s.* per cwt.: the 184 casks, when sold on the 5th of April, fetched 51*s.* 6*d.* per cwt. only.

On the part of the defendant, it was insisted that enough had been paid into court to satisfy the plaintiff's claim in respect of the breach

(*a*) Fourteen of the one parcel, and two of the other.

of contract; and that the true measure of damages, was, the difference between the value of so many casks of tallow of the quality contracted to be sold, and the value of the article actually delivered: and, further, that the plaintiff's conduct amounted to an acceptance of the tallow in satisfaction of the contract; and that the sale was unauthorized, and unreasonably delayed.

On the part of the plaintiff, it was submitted that he was entitled to recover, as damages for the breach of contract, the difference between the contract price, and the sum produced by the tallows on the resale.

The learned judge left it to the jury to say, whether the plaintiff
*131] accepted the tallow delivered as a *fulfilment of the contract, and whether it had been resold within a reasonable time. The jury answered the first question in the negative and the second in the affirmative; and they assessed the damages at 516*l.*, which was less by 361*l.* 13*s.* than the sum which the plaintiff would be entitled to upon the principle of assessment insisted upon by him, viz. the difference between the contract-price pre-paid by him and the price for which the tallows were resold.

Byles, Serjt., in Michaelmas Term last, obtained a rule nisi to enter a verdict for the defendant, pursuant to leave reserved, "on the ground, that, according to the true mode of computing the damages, the money paid into court was sufficient." He submitted that the plaintiff had adopted the contract by accepting part of the tallows, and selling the rest in his own name, and without authority from the defendant; and that the true measure of damages, assuming the plaintiff to be entitled to recover, was, the difference between the value of tallow such as that contracted for, and of that which was actually delivered. He referred to Chapman *v.* Morton, 11 M. & W. 534.†

Hugh Hill, Q. C., and *Aspland*, showed cause.—The sole question upon this rule is, whether the learned judge was bound to tell the jury to find for the defendant, and that the sum paid into court was sufficient to cover any damages the plaintiff was entitled to for the breach of the contract. Whether or not the plaintiff accepted the tallow as a fulfilment of the contract, was clearly a question for the jury,—see per Parke, B., in Chapman *v.* Morton, 11 M. & W. 540,† and it is submitted that the sum the plaintiff was entitled to recover, was, the difference between the contract price which he had paid and the sum which
*132] the inferior tallows realized *on the resale; and that, it being admitted on the record that the tallows delivered were not the tallows contracted for, it was a question of fact for the jury whether the plaintiff had taken to them under the contract, or repudiated the contract, and resold under justifiable circumstances and within a reasonable time: and there was no evidence to warrant them in concluding that the plaintiff ever meant to take to the shipment as a performance of the contract, or that the sale was unreasonably delayed. The plaintiff had parted with his money; and, the defendant failing to return it, he was justified in selling the goods to reimburse himself. The sale was a mere mode of ascertaining the amount of damages. As to the measure of damages, Powell *v.* Horton, 2 N. C. 668 (E. C. L. R. vol. 29), 3 Scott 110, is directly in point. There, the defendant contracted to sell to the plaintiff "Scott & Co., 75 barrels mess pork, at 53*s.* per barrel:" at the trial it was proved that mess pork cured by Scott & Co. obtained in

the market a higher price by 2*s.* 6*d.* per barrel than pork cured by any other house; and witnesses (connected with the trade) were allowed to state their construction of the contract: it was held, that, by the terms of the contract, the pork was expressly warranted to be pork *cured* by Scott & Co., and not merely *consigned* by that firm, and that the witnesses were properly admitted to explain the contract. Upon the question of damages, Bosanquet, J., said: "The article having been sold as pork of a particular description, and not answering that description, the proper measure of damages was that which the jury have given, viz. the difference between the invoice price and the sum produced on the resale; and, under the circumstances, I think the sale was not delayed for an unjustifiably long period." The distinction between the case of money paid in advance and other cases, is pointedly referred to in Gainsford *v.* Carroll, 2 B. & C. *624 (E. C. L. R. vol. 9), 4 D. & R. 161 (E. C. L. R. vol. 16), where it was held, that, in assumpsit for not [*133 delivering goods upon a given day, the true measure of damages is, the difference between the contract price and that which goods of a similar quality and description bore on or about the day when the goods ought to have been delivered. On the cases of Shepherd *v.* Johnson, 2 East 211, and M'Arthur *v.* Lord Seaforth, 2 Taunt. 257, being cited, the court said,—"These cases do not apply to the present. In the case of a loan of stock, the borrower holds in his hands the money of the lender, and thereby prevents him from using it altogether. Here, the plaintiff had his money in his possession, and he might have purchased other bacon of the like quality the very day after the contract was broken; and, if he has sustained any loss by neglecting to do so, it is his own fault." Upon the whole, it is submitted that the question was properly for the jury, and that their mode of estimating the damages was the correct one, or, at all events, not open to objection on the part of the defendant.

Byles, Serjt., and *T. Jones*, in support of the rule.—The true measure of damages can have nothing to do with the market price, but is, the difference between the value of the tallows which the plaintiff contracted to buy, and that of those which he *did* receive. In the first place, the plaintiff had no authority from the defendant to sell the tallows at all; and, if he had, he should have sold the whole of them, and not in his own name. His dealing with them as he did was the same as if he had taken to the goods in the first instance. He might have rescinded the contract, and brought his action to recover back the money which he had paid. He has not done so here: and, if he had, he could not have recovered; for, he cannot affirm the contract as to part and reject it as to the other part. In Harnor *v.* Groves, 15 C. B. 667 (E. C. L. R. vol. 80), it was held that the vendor of *goods who has [*134 used or sold a portion of them after he has discovered that they do not answer the contract, cannot repudiate the contract, and recover back the price. So, in Blackburn *v.* Smith, 2 Exch. 783,† it was held that a purchaser of an estate could not repudiate the contract for a defect of title, after he had dealt with the property as his own. Chapman *v.* Morton, 11 M. & W. 534,† in its circumstances very closely resembles this case. There, the plaintiffs, merchants at Dieppe, sold to the defendant, a merchant at Wisbech, a quantity of oil-cake, which was delivered to the defendant there in December, 1841. The defend-

ant, conceiving that the cargo did not answer the sample, landed a portion of it for the purpose of examination, and subsequently landed the whole, stored it in a public warehouse, and wrote to the plaintiffs, informing them that it lay there at their risk and costs, and requiring them to take it back, which the plaintiffs refused to do. After some correspondence, the defendant, in May, 1842, gave the plaintiffs notice that the cargo was lying at the warehouse at their disposal, and that, if no directions were given by them, it would be sold, and the proceeds applied in part payment of the defendant's damages. The plaintiffs answered that they considered the transaction at an end, and demanded payment of the price. The defendant thereupon offered the cargo for sale in his own name, and in July sold it in his own name to a third party. In an action to recover the price of the oil-cake, the Lord Chief Baron ruled that these facts amounted to an acceptance, and directed the jury to find for the plaintiff. So, here, the learned judge should have directed the jury to find that the plaintiff accepted the tallow as a fulfilment of the contract. Assuming this to be an action for not delivering tallow according to contract, the true measure of damages is that above suggested, and in that case the sum paid into court is sufficient to cover the plaintiff's
*135] *claim. [WILLIAMS, J.—This is not the case of a specific chattel.] Still the measure of damages would be the same: the only difference being, that, in the case of the sale of a specific chattel, the buyer must take it, even though it should not answer the purpose for which it is bought; whereas, in the case of an ordinary sale, the buyer may reject the article if it does not answer the contract. The correct rule, as the result of all the cases, is thus stated in Sedgwick on Damages, 2d edit., p. 218: "It seems originally to have been held that the measure of damages in these cases was, the difference between the price paid and actual value; but it is now well settled that the rule is, the difference between the actual value and the value that the article would have possessed if it had conformed to the warranty, the price paid being mere evidence of that value." From the note at p. 274 of that work, it seems that Chancellor Kent had in a former edition of his Commentaries used the word "price," instead of "value;" but
*136] that he has corrected it in a recent edition.(a) *In Maine on Damages 88, the rule is stated as follows:—"Where the article has not been returned, the measure of damages will be, the difference between its value, with the defect warranted against, and the value

(a) The note is as follows:—The opinion expressed by Mr. Chancellor Kent is also well worthy of notice. The text of the original edition of this work contained the following passage,—"Chancellor Kent, in his Commentaries, Vol. II., 480, § xxxix., says, 'The general rule is well settled, that, in a suit by vendee, for a breach of contract on the part of the vendor, for not delivering an article sold, the measure of damages is, the *price* of the article at the time of the breach.' The learned Chancellor appears here to overlook the distinction resulting, as we have seen, from the payment of the price beforehand, which runs through these cases, and which is entirely analogous to the rule in trover, that the value of the chattel, not at the moment of conversion, but its highest value up to the time of trial, is the rule of damages." To which the Chancellor, in his 6th edition, replied as follows,—"The learned author is mistaken in supposing I had overlooked that distinction. These Commentaries are not calculated to embody all the nice or arbitrary or fanciful distinctions that are to be met with in the reports. I do not regard the distinction alluded to as well founded or supported. It is disregarded or rejected by some of the best authorities cited. The true rule of damage is, the *value* of the article at the time of the breach, or when it should have been delivered. Mr. Sedgwick seems himself to come to that conclusion amid the contrariety of opinion and cases which he cites."

which it would have borne without that defect. It was formerly laid down that the measure would be, the difference between the *contract price*, and that for which it would sell with its defect: Caswell *v.* Coare, 1 Taunt. 566. But the weight of authority in England is strongly in favour of the rule as stated above: see per Buller, J., Towers *v.* Barrett, 1 T. R. 136; per Lord Eldon, C. J., Curtis *v.* Hannay, 3 Esp. N. P. C. 82; Clare *v.* Maynard, 6 Ad. & E. 519 (E. C. L. R. vol. 33), 1 N. & P. 701 (E. C. L. R. vol. 36), 7 Car. & P. 741 (E. C. L. R. vol. 32); Cox *v.* Walker, 6 Ad. & E. 523, n. And the doctrine in America is the same: see Sedgwick on Damages 293." The market price cannot be looked at. The buyer is entitled to receive that which the seller contracted to sell; if an article of less value be delivered, he is entitled to the difference: and the rule is the same whether the contract be for the sale of a specific chattel, or a general contract,—except that, in the former case the buyer *must* take the thing delivered, and in the latter he need not. All the cases both here and in America result in what is stated as the rule in Sedgwick, in Kent, and in Maine: the true measure, is the amount of the inferiority in value. The fact of the agreed price of the article having been paid beforehand *in no degree varies the case: in none of the authorities has it ever been so laid down; and here it clearly could not, the sale having taken place without the defendant's authority or consent. With respect to Powell *v.* Horton, 2 N. C. 668 (E. C. L. R. vol. 29), 3 Scott 110, it may be observed, that it is Bosanquet, J., alone who speaks of the price having been paid; and that that case was decided long before the rule as to the measure of damages in cases of this sort was as it is now laid down. [WILLES, J.—It is at least as old as Leigh *v.* Paterson, 8 Taunt. 540 (E. C. L. R. vol. 4). I thought that case had settled the rule as to damages.] Suppose this had been a question upon the statute of frauds, would not the facts here have been evidence of an acceptance under s. 17? [CRESSWELL, J.—I apprehend not.] That is contrary to Morton *v.* Tibbett, 15 Q. B. 428 (E. C. L. R. vol. 69). [*137

Cur. adv. vult.

WILLIAMS, J., now delivered the judgment of the Court:

This was an action brought to recover damages for the breach of two contracts for the sale of one hundred casks of tallow each, by the delivery of an article inferior in quality to that which was sold.

The tallow arrived by the ship Emilie in London, where the plaintiff and defendant resided, on the 12th of January, 1856. The unloading of the cargo commenced on the 16th, and was finished on the 25th of January. As soon as the plaintiff had inspected the tallow offered for delivery, he objected to the quality, as not fulfilling the terms of the contract, in a letter dated the 28th of January; and thereupon a correspondence began between him and the defendant, which continued until the 12th of March, when a resale took place by order of the plaintiff.

The price of the tallow had been paid in advance; *and this action was brought to recover the difference between the contract price so paid and the amount realized by the resale. [*138

The defendant had paid a sum of 234*l.* into court.

The market-price of tallow had fallen considerably on the 17th of

January, and continued to decline until the resale on the 12th of March.

At the trial, before my Brother Willes, there was no dispute as to the breach of the contract, by delivering tallow of an inferior quality; but it was contended by the defendant, without taking any objection to the form of the declaration, that the sum paid into court was sufficient to cover the damages sustained: and this depended on the principle on which the damages ought to be estimated.

The learned judge left it to the jury to say whether the plaintiff had accepted the tallow as a delivery under the contract: and, the jury having found in the negative, the damages were assessed at a sum far exceeding that which had been paid into court, but far less than the difference between the contract price prepaid by the plaintiff, and the sum for which the tallows were resold. The jury further found that the plaintiff resold the tallow as soon as he reasonably could, and that it was properly sold.

The learned judge reserved leave to the defendant to move to enter a verdict for him, if, upon the facts proved at the trial, it should appear to the court that the defendant had paid in a sum sufficient to cover the damages legally sustained by the plaintiff.

On the argument in this court it was contended that the judge, under the circumstances, ought not to have left such a question to the jury, but should have directed them to find an acceptance,—as Lord Abinger did in Chapman *v.* Morton, 11 M. & W. 534,† upon evidence very simi-
*139] lar. On the other hand, it was argued, *that, in that case, Parke, B., expressed his opinion that it was a question of fact for the jury; and that his opinion was the better one, and had been properly acted on by my Brother Willes.

But, on further consideration, we have come to the conclusion that this point does not properly arise in the present case; for, that we ought, at all events, to disregard the finding of the jury on this matter. If we were to act on it, the consequence would be that we must treat the action as brought for money had and received, and the plaintiff would be entitled to recover a greater amount of damages than the verdict has given him, and even more than he asked for at the trial; for, he would be entitled to recover back the whole money prepaid, deducting only the amount paid into court; and the defendant would be put to bring a cross-action against the plaintiff in respect of his unauthorized sale of the tallows. But it is plain, both from the conduct of the cause and the form of the declaration, that this action was brought to recover damages for the delivery of the inferior tallow, and not to recover back the money paid in advance; and that the plaintiff, in effect, elected to sue for such damages, instead of bringing an action for money had and received: and the concession of the defendant's counsel as to the form of the pleadings was not intended substantially to affect the position of the parties in this respect; but his objection in effect was, that, upon the facts of the case, and these pleadings, in any form into which they might be properly put by amendment, no claim could be sustained for damages beyond the amount paid into court.

Looking at the case in this aspect, we think that the prepayment cannot be taken into consideration in apportioning the damages; and that the true measure of damages would have been, if there had been

nothing else in the case, the difference between the value of *tallow of the quality contracted for, at the time of the delivery, and [*140 the value of the tallow actually delivered. This, however, is on the assumption that the tallow delivered could be immediately resold in the market. But, as in the present case it appears clearly from the correspondence that the defendant by his conduct delayed the resale: and, as the jury have found, we think, correctly, that the resale on the 12th of March was in a reasonable time, we are of opinion that the proper measure of damages is, the difference between the value in the market of tallow of the quality contracted for on the 25th of January, and the amount made by the resale of the tallow actually delivered.

Applying this principle, the case, as to amount, stands thus:—No damage is claimed in respect of sixteen of the casks, which answered the description in the contract. The remaining 184 casks, containing 1549 cwt. net, were sold at about 51*s.* 6*d.* per cwt. and fetched in all 3896*l.* 9*s.* The price of tallow, according to the contract, upon the 25th of January, when the landing and delivery took place, was 58*s.* per cwt. The correct amount of damages will, therefore, be, the difference between 1549 cwt. at 58*s.* per cwt., making 4492*l.* 2*s.*, and the above sum of 3896*l.* 9*s.* (the actual proceeds of the inferior tallow), or 595*l.* 13*s.* Deducting from this the sum paid into court, 234*l.*, there will be left 361*l.* 13*s.*

The damages must, therefore, be reduced from 516*l.* to 361*l.* 13*s.*

Rule absolute accordingly.

In Pennsylvania it is settled that in an action for a breach of warranty on the sale of goods, the fact that the price has been paid beforehand makes no difference in the rule by which the damages are to be measured. The same distinction which is taken in the principal case between action on the warranty, and for the price, on a rescission of the contract, is there asserted: Smethurst *v.* Woolston, 5 Watts & Serg. 106; Wilkinson *v.* Ferrie, 24 Penn. St. 190: See Bank of Montgomery *v.* Reese, 26 Penn. St. 148, which does not qualify the former cases on this point. But in other states it is held that the prepayment of the price gives the vendee the right to damages according to the highest market rate at any time before the trial, at least if without unreasonable delay he commences suit against the vendor: West *v.* Wentworth, 3 Cowen 82; Clark *v.* Pinney, 7 Cowen 681; West *v.* Pritchard, 19 Conn. 212; Randow *v.* Barton, 4 Texas 287. In other cases the general rule seems now adopted on all hands that the contract price furnishes no test, but that the measure of damages is the difference between the actual value of the chattel, and what its *value* would have been, if it had conformed to the warranty: Tuttle *v.* Brown, 4 Gray 457; Fish *v.* Hicks, 11 Foster 535; Moulton *v.* Scruton, 39 Maine 287; Sharon *v.* Mosher, 17 Barb. 518; Foster *v.* Rodgers, 27 Ala. 602; Thornton *v.* Thompson, 4 Gratt. 121; Verdier *v.* Trowell, 6 Rich. L. 166; Woodward *v.* Thacher, 21 Verm. 580; Borrekens *v.* Bevan, 3 Rawle 23.

END OF TRINITY VACATION.

CASES

ARGUED AND DECIDED

IN THE

COURT OF COMMON PLEAS,

IN

Michaelmas Term,

IN THE

TWENTY-FIRST YEAR OF THE REIGN OF VICTORIA, 1857.

The Judges who usually sat in banco in this Term, were,—
COCKBURN, C. J., WILLIAMS, J., CROWDER, J., AND WILLES, J.

REGULÆ GENERALES.

Appeals under the statute 20 *&* 21 *Vict. c.* 43.

1. IT is ordered, that, in cases of appeal to a superior court under the provisions of the statute 20 & 21 Victoria, c. 43, the 15th and 16th rules of Hilary Term, 1853,(*a*) so far as the same are applicable, shall be observed.

2. And, in cases where the appeal is to be heard before a Judge at Chambers, the appellant shall obtain an appointment for such hearing, *142] and shall forthwith *give notice thereof to the respondent, and shall, four clear days before the day appointed for the hearing, deliver at the Judges' Chambers a copy of the appeal.

CAMPBELL.
A. E. COCKBURN.
FRED. POLLOCK.
W. WIGHTMAN.
W. ERLE.
E. V. WILLIAMS.
SAMUEL MARTIN.
R. B. CROWDER.
J. WILLES.
G. BRAMWELL.
W. F. CHANNELL.

November 25, 1857.

(*a*) See 13 C. B. 5, 6 (E. C. L. R. vol. 66).

HIGHMORE, Clerk, *v.* THE EARL AND COUNTESS OF HARRINGTON. *Nov.* 3.

The court refused to grant a new trial on the ground that the damages were excessive, where the jury had given 750*l.* in an action for defamatory words spoken of a beneficed clergyman to his curate.

THIS was an action of slander. The plaintiff was the Vicar of Elverston, in the county of Derby. The slander complained of was uttered by Lady Harrington in a conversation with one Jones, the plaintiff's curate, upon his calling one day to lunch at Elverston Hall. It appeared that the plaintiff and a large section of his parishioners were at variance; and that many idle and unfounded stories were told in the village as to his undue familiarity with a female servant, and his misappropriation of the sacrament-money, &c. These were repeated by Lady Harrington to Mr. Jones, on the occasion alluded to, and the immoral character of the plaintiff assigned by her as her reason for declining to take the sacrament at his hands. This conversation *was conveyed, and [*143
(as was alleged by Lady Harrington, when called to contradict Jones at the trial) with considerable exaggeration, by Jones to the plaintiff, who thereupon brought this action.

The cause was tried before Cresswell, J., at the last Assizes at Derby. The only witnesses of any importance were Mr. Jones on the one side, and Lady Harrington on the other,—in direct opposition. The jury returned a verdict for the plaintiff, damages 750*l.*

Edwin James, Q. C., now moved for a new trial, on the ground that the verdict was not warranted by the evidence, and that the damages were excessive. He submitted that the character in which Mr. Jones came to Elverston Hall, and the circumstances under which the alleged slander was uttered, might almost be said to make it a privileged communication; and that, at all events, the plaintiff could have sustained no real damage. [COCKBURN, C. J.—If the jury believed that Mr. Jones's evidence was true, I think it impossible that we can say the damages are excessive. My own impression is, that juries are hardly liberal enough in these cases.] Lady Harrington was merely telling Jones her reasons for abstaining from assisting at a solemn rite of the church; and it was not creditable in Jones to make so ill a return for the hospitality he was receiving at the hands of her ladyship. [COCKBURN, C. J.—Was it not the curate's duty to communicate to his vicar the charges which he had heard made against him? What need was there for Lady Harrington to tell Mr. Jones her reasons for declining to take the sacrament from the vicar?] If Jones had wished to do his duty as a gentleman and a Christian minister, he would have put the lady on her guard at the outset.

COCKBURN, C. J.—I am of opinion that there ought to *be no [*144
rule in this case. There was a direct conflict at the trial between the evidence of Jones and that of Lady Harrington: and the jury thought proper to come to the conclusion that the former was worthy of belief. That being so, I have no hesitation in saying, that, looking at the destructive and fatal tendency of the imputations cast upon the plaintiff as a clergyman and a gentleman, the damages which the jury have awarded him are anything but excessive.

CROWDER, J.—The charges being so serious, I entirely agree with my Lord in thinking that the damages are far from being excessive.

The rest of the court concurring, Rule refused.

DANIEL KEENE *v.* JAMES KEENE. *Nov.* 5.

Where a bill is drawn for a given sum, "with interest at 10 per cent. per annum," the *drawee*, on the default of the acceptor, is liable for interest at 10 per cent. after the maturity of the bill and notice of the dishonour.

THIS was an action for the balance of an account. One of the items of the plaintiff's claim consisted of a bill of exchange for 200*l.*, drawn by the defendant upon one Edward Keene, on the 21st of February, 1853, payable twelve months after date, with interest at the rate of 10*l.* per cent. per annum, and endorsed by Edward Keene to the plaintiff, and which bill had been dishonoured.

The cause was referred to one of the masters, under the compulsory clauses of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125, ss. 8 et seq.). The plaintiff having proved the presentment and dis-
*145] honour of *the bill, and that due notice thereof had been given to the defendant, claimed interest at the rate of 10*l.* per cent. per annum. For the defendant it was insisted that the endorsee was only entitled to recover *from the drawer* interest at 5 per cent. from the maturity of the bill. The master having allowed 10 per cent.,

Tompson Chitty now moved, on the part of the defendant, to refer the matter back to the master for reconsideration. The drawer of a bill which is dishonoured by the acceptor is only liable for interest from the time at which he receives notice of the dishonour,—Walker *v.* Barnes, 5 Taunt. 240 (E. C. L. R. vol. 1): and there is no implied contract on the part of the drawer, on the acceptor's default, to pay more than the ordinary interest of 5 per cent. [CROWDER, J.—Does not the drawer undertake to pay, upon the acceptor's default, what the acceptor was bound for?] The acceptor would only be liable to interest at 5 per cent. after the maturity of the bill. The bill is in effect a bill for 220*l.* [WILLES, J.—That clearly is not so. Until the maturity of the bill, the interest is a debt: after its maturity, the interest is given as damages, at the discretion of the jury. Colonel Fremont had to pay 25 per cent. (the Californian rate of interest) upon the bills which he drew there on Mr. Buchanan, the secretary of state of the United States, at Washington, and which bills had been protested for non-acceptance: see Gibbs *v.* Fremont, 9 Exch. 25.† Here a jury might adopt as the measure of damages the rate of interest which the parties themselves had fixed: and the master is substituted for a jury.]

COCKBURN, C. J.—I see no ground for referring this case back to the master, as prayed. He has, as he well might, given in the shape of
*146] damages the rate of *interest the parties themselves had contracted for. I think he has done quite right.

CROWDER, J.—I am of the same opinion.—The master would, I think, have acted very unreasonably if he had not assessed the damages by the rate which the parties had stipulated as the value of the money.

The rest of the court concurring, Rule refused.

TOOMEY *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. *Nov.* 17.

On the platform of a railway station there were two doors in close proximity to each other, the one, for necessary purposes, had painted over it the words, "For gentlemen," the other had over it the words, "Lamp-room." The plaintiff, having occasion to go to the urinal, inquired of a stranger where he should find it, and having received a direction, by mistake opened the door of the "lamp-room" and fell down some steps and was injured. In an action against the railway company:—Held, that, in the absence of evidence that the place was more than ordinarily dangerous, the judge was justified in nonsuiting the plaintiff, on the ground that there was *no evidence* of negligence on the part of the company.

THIS was an action in which the plaintiff sought to recover damages against the London, Brighton, and South Coast Railway Company, for an injury sustained by the plaintiff from alleged negligence on the part of their servants.

The declaration stated, that, before and at the time of committing of the grievances thereinafter mentioned, the defendants were possessed of a public railway station, to wit, at Forest Hill, for the reception of passengers in and by the defendants' railway, for the profit and advantage of the defendants, and by reason of the possession and use of the said railway station by the defendants for the purpose aforesaid, they ought to have kept the same in a reasonably safe and secure condition, and *so as not to be dangerous to persons lawfully and properly using the same; nevertheless, the defendants failed in such duty, and [*147 by means of the mere neglect and default of the defendants in that behalf, the plaintiff, who was lawfully in and using the said station as a passenger of the defendants, and with their permission, and for their profit and advantage, fell through a door, which the defendants then carelessly, negligently, and improperly left open and unguarded, in the said station, and which was by the neglect and default of the defendants in that behalf dangerous to persons lawfully and properly using the same, into a deep cellar or hole, and thereby sustained divers bodily injuries, and became permanently wounded in health and disabled from following his trade of hawker, or otherwise earning his living, and was put to expense, and spoiled his clothes which he had on, and lost divers of his goods and money which he had with him when he fell, and was and is otherwise injured: And the plaintiff claimed 500*l.*

The defendants pleaded not guilty.

The cause was tried before Cresswell, J., at the first sitting at Westminster in this term. The facts were as follows:—The plaintiff, a poor and illiterate person who carried on the employment of a hawker, went to the Forest Hill station of the London, Brighton, and South Coast Railway, for the purpose of proceeding to London by the 10.30 P. M. train. Whilst waiting there, he inquired of a person on the platform, unconnected with the railway, where he should find a urinary: this person told him to go to the right: he did so, and found two doors, upon one of which was painted the words "For gentlemen," and upon the other the words "Lamp-room;" there being a light over the former, but none over the latter. The plaintiff, being in a hurry, and unable to read, opened the wrong door, stepped forward, and fell down some steps, breaking two of his ribs, and *otherwise seriously hurting himself. [*148 There was no evidence as to the description of the steps down which the plaintiff fell, nor as to the state in which the door of the lamp-

room was ordinarily kept: but the plaintiff's son stated, that, when he went some time after the accident to look at the place, he found the door locked.

On the part of the defendants, it was submitted that there was no evidence to go to the jury of negligence, and that the accident was attributable entirely to the plaintiff's own want of caution in going hastily and in the dark through a strange door.

The learned judge was of this opinion, and the plaintiff was nonsuited, with leave to move to enter a verdict for 35*l.* (agreed damages), if the court should be of opinion that there was evidence which ought to have been submitted to the jury.

Pigott, Serjt., now moved accordingly.—The question is, whether there was any evidence of negligence on the part of the company or their servants: if there was, it should have been left to the jury. Railways are constructed for the use of all classes of persons, whether literate or otherwise. Travellers of all sorts use them at all times; and the rapidity with which things are conducted at the stations, leaves so little time for reflection, that it is incumbent on the companies so to order them as to prevent the possibility of an accident like this occurring. This is not an action for the breach of a common-law duty, but an action of tort founded on contract, as was said by Maule, J., in Martin *v.* The Great Northern Railway Company, 16 C. B. 179 (E. C. L. R. vol. 81), where an action was held to lie against the defendants for insufficiently lighting a station, whereby the plaintiff, in running across the railway to get to a train, fell over a switch-handle, and was injured. [WILLIAMS, J.—If *149] the plaintiff had taken ordinary care, the accident would *not have happened. He should not have gone so hastily through a strange door.] He could not expect a door in such a situation to lead him to any danger. The door should have been kept locked. Suppose it had been made to open inwards, and a person leaning against it fell through, would it be any answer on the part of the company to say that the door was not intended for people to lean against? In Taylor on Evidence, 2d edit., Vol. I., p. 44, § 31, it is said: "Questions of *reasonable skill or care*, *due diligence*, and *gross negligence*, must, in the great majority of instances, be determined by the jury, since the judges can rarely have materials which will enable them to decide such questions by rules of law. Thus, if an action be brought against a surgeon for negligence in the treatment of his patient,—per Taunton, J., in Doorman *v.* Jenkins, 2 Ad. & E. 261 (E. C. L. R. vol. 29), 4 N. & M. 174 (E. C. L. R. vol. 30),—or against a gratuitous bailee for gross carelessness in losing the property intrusted to his care,—Doorman *v.* Jenkins, 2 Ad. & E. 256, 4 N. & M. 170,—what law can possibly define whether such and such conduct amounts to sufficient negligence on the part of the defendant to entitle the plaintiff to a verdict? In these and the like cases, therefore, the question has usually been left entirely to the jury, and, even when they have found a verdict in opposition to the opinion of the presiding judge, the court has generally refused to grant a new trial." This is not like the case of negligence on the part of an attorney, which is a mixed question of law and fact.

WILLIAMS, J.(*a*)—I am of opinion that there should be no rule in this

(*a*) Cockburn, C. J., and Crowder, J., being shareholders in the company, declined to take part in the discussion.

case. I think there was no evidence of negligence on the part of the company or their servants *which ought to have been submitted to the jury. It is not enough to say that there was *some* evidence; for, every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury: there must be evidence upon which they might reasonably and properly conclude that there was negligence. All that appeared, was, that the plaintiff inquired of a stranger the way to the urinal, and, being told to go in a particular direction where there were two doors, unfortunately opened the wrong one, and through his own carelessness fell down some steps. If there had been any evidence to show that these steps were more than ordinarily dangerous, that possibly might have led to a different conclusion. But all that appears, is, that the door in question led down some steps into a room which was used for the purposes of the company, and not for the convenience of the public. I cannot say that there was such evidence of negligence in the defendants as the learned judge was bound to leave to the jury. [*150

WILLES, J.—I am entirely of the same opinion. In order to establish a case of negligence against the defendants, it was incumbent on the plaintiff to prove some fact which was more consistent with negligence than with the absence of it. There was nothing of the sort proved here. There was nothing to show that the door and the steps beyond were more than ordinarily dangerous; and it was necessary and proper that something of the sort should be there for the convenient use of the station by the company. It would be difficult so to arrange every part of a station as to render it *impossible for careless persons to meet with injury. I think the plaintiff failed to make out that he sustained the injury complained of through any negligence of the company or their servants. [*151

Rule refused.

KING *v.* THE ACCUMULATIVE LIFE FUND AND GENERAL ASSURANCE COMPANY. *Nov.* 4.

A. effected a policy "upon and for twenty years' continuance of the life of himself," with the Accumulative Life Fund and General Assurance Company. By the terms of the policy it was provided that "the capital stock and other securities, funds, and property of the company remaining at the time of any claim or demand unapplied and undisposed of, and inapplicable to prior claims and demands in pursuance of the provisions of the deed of settlement, should alone be liable to answer and make good all claims and demands upon the said company, or otherwise, under or by virtue of that policy;" and that no director, officer, or shareholder should be individually or personally liable, &c.

The deed of settlement entitled policy-holders to participate in profits; and also contained provisions enabling the directors in certain events to dissolve the company.

The directors having,—not in strict accordance with their powers to dissolve the company,—transferred its funds and property to another company, who were to take their liabilities, A. brought an action against the company (his assurers), charging them with having wrongfully aliened and transferred their property, and ceased to carry on business, whereby he lost the moneys and profits he would otherwise have made from the continuance of the contract:—

Held,—first, that there was no implied contract on the part of the company to continue to carry on the business,—secondly, that, if there were, there was no evidence of any breach

of it, inasmuch as if the transfer was properly made, there was no cause of action, and, if not warranted by the deed of settlement, it was ultrà vires, and void,—thirdly, that the plaintiff had commenced his action before he had sustained any injury.

THIS was an action on a policy of assurance on the life of the plaintiff.

The declaration stated, that, on the 29th of June, 1854, the plaintiff caused to be effected with the defendants a policy of assurance in the words and figures following, that is to say,—"Accumulative Life Fund and General Assurance Company. Chief Offices, No. 14, Manchester Square. No. 50. Sum assured, 100*l.* Premiums, 1*l.* 4*s.*, payable quarterly. Age admitted. Whereas, Mathias Butcher King, of, &c., hereinafter called 'the assured,' has proposed to effect an assurance with *152] The Accumulative Life Fund and General *Assurance Company, in the sum of 100*l.* upon and for twenty years' continuance of the life of himself: And whereas the said assured has paid to the said company the sum of 1*l.* 4*s.* as a premium or consideration for this assurance for three months, until the 1st of July, 1854: Now, this policy witnesseth, that, if the said M. B. King shall die before or upon the 1st of July, 1854, or shall live beyond that day, and the said assured or his assigns, or the holder of this policy who shall be registered as such in the book hereinafter mentioned of the said company, shall on or before that day, and on or before the 1st of October, 1st of January, 1st of April, and 1st of July in this and in each and every succeeding year during the continuance of this assurance, pay to the said company the premiums of 1*l.* 4*s.*, then the funds and other property of the said company shall, according to the provisions of the deed of settlement of the said company, be subject and liable to pay to the executors, administrators, or assigns of the said assured, or to the holder of this policy, who shall be registered as aforesaid, after satisfactory proof of the death of the said M. B. King shall have been received at the office of the company, the sum of 100*l.* of lawful money of Great Britain: Provided always that the secretary of the said company shall, upon the request of the holder of this policy, and with the consent in writing of the said assured, register such holder in a book to be called 'The register of holders of policies:' Provided also that the payment as above mentioned of the said sum of 100*l.* to the holder of this policy who shall be registered as aforesaid, shall be a good and sufficient discharge to the said company from and against any claims and demands upon or in respect of this policy: Provided also, and these presents are upon the condition, that, in case the person upon whose life this assurance is effected (or if *153] all, any, or, either of such *persons, if there be more than one) shall go beyond the limits of Europe, or, being or becoming a military or naval man, shall enter into actual service, a written notice of every such event shall be forthwith given to the board of directors of the said company, and such additional premium or premiums shall be payable and from time to time be paid to the said company in respect thereof as the board of directors shall deem reasonable, and shall award and direct to be paid: Provided also, and these presents are upon this express condition, that this policy shall be indisputable, except in cases of fraud: Provided also, that the capital stock and other the securities, funds, and property of the said company remaining at the time of any claim or demand made, unapplied and undisposed of, and inapplicable to

prior claims and demands in pursuance of the provisions of the said deed of settlement, shall alone be liable to answer and make good all claims and demands upon the said company, or otherwise, under or by virtue of this policy; and that no director, officer, or shareholder of the said company, his heirs, executors, or administrators, shall by reason of this policy be in anywise individually or personally liable or subject to any such claims or demands, or be in anywise charged by reason thereof beyond the amount unpaid of his shares in the said capital stock, nor longer than he shall retain the same shares. Given under the hands of three of the directors, and sealed with the common seal of the said company, this 29th of June, 1854. Payable at the age of 50, in 1874. Examined, &c. R. J. H., P. E. B., and R. W., directors. Robert Jones, secretary:" That the defendants by the said policy covenanted and agreed with the plaintiff as therein mentioned: That, from the time of making the said policy until the breach thereinafter mentioned, the plaintiff did all things necessary on his part, and was ready and *willing to do all things which it was necessary that he should be [*154 ready and willing to do to entitle him to sue for the breach and matter thereinafter mentioned: Yet, that the defendants, after making the said policy, and whilst the same was in force, wrongfully aliened, transferred, and disposed of all their funds and other property to another company called "The Anglo-Australian and Universal Family Life Assurance Company," contrary to the provisions of their deed of settlement, and then and from thence hitherto wholly and absolutely ceased to carry on business according to their said deed of settlement or otherwise, or to accumulate or acquire, or to endeavour to accumulate or acquire, any funds or property, and thereby disabled themselves from performing the said contract with the plaintiff, and then wholly and absolutely discharged the plaintiff from paying any more of the said premiums; whereby the plaintiff lost the moneys and profits which he might and otherwise would have made from the continuance of the said contract.

The defendants pleaded,—first, that, after the making of the said policy in the declaration mentioned, and whilst the same was in force, they, the defendants, did not wrongfully alien, transfer, and dispose of all their funds and other property to the said Anglo-Australian and Universal Family Life Assurance Company, contrary to the provisions of their deed of settlement, and did not then and from thence hitherto wholly cease to carry on business according to their said deed of settlement or otherwise, or to accumulate or acquire, or to endeavour to accumulate or acquire any funds or property, and that they did not thereby disable themselves from performing their said contract with the plaintiff, and then wholly and absolutely discharge the plaintiff from paying any more of the said premiums,—secondly, never indebted. Issue thereon.

*The cause was tried before Williams, J., at the first sitting at [*155 Westminster in last Easter term. The deed of settlement of the company, bearing date the 10th of February, 1854, was put in. The material provisions thereof were as follows:

Clause 82. "That the directors shall apportion the amount of clear profits set apart as aforesaid in such manner as they shall think fit, and one part thereof shall be appropriated as a bonus to the shareholders, and divided among them in proportion to their respective shares in the capital of the company, and the other part shall be appropriated for the

payment of bonuses to the holders of such policies as shall be entitled to profits at the period up to which the periodical calculations on which the appropriation is founded shall have been made; and the directors shall cause such last part of the said profits to be apportioned among the persons for the time being recognised by the company as entitled to such assurances, according to a fair calculation to be made by the actuary of the company, subject to the approval of the directors."

Clause 100. "That an absolute dissolution of the company shall be made only under the following circumstances, that is to say, if a resolution for that purpose shall be reduced into writing, and shall be twice read and put to the vote, and shall be carried by a majority of at least three-fourths in number of the shareholders present, holding among them at least three-fourths of the shares of the company, at an extraordinary general meeting, and if such resolution shall be confirmed by a like majority at a subsequent extraordinary general meeting, to be held after the expiration of fourteen days, but before the expiration of two calendar months, next after the general meeting at which such first resolution shall have been passed,—then the company shall be dissolved; and it is thereby *declared to be dissolved accordingly, except for the purpose mentioned in the next following clause (and without prejudice thereto), from the date of such second general meeting."

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Clause 101. "That, immediately upon the dissolution of the company, the board of directors shall, out of the funds or property of the company, pay and satisfy all immediate claims and demands on the company arising from assurances, annuities, or other contracts or engagements, and shall, if practicable, obtain from the directors or managers of some other assurance company an undertaking to pay and satisfy the remainder of the claims and demands on the company arising from assurances, annuities, endowments, and other contracts and engagements, when and as the time for the payment and satisfaction of the same shall successively arise, and shall cause to be transferred to some of the trustees of such other assurance company, or as the directors thereof shall direct, so much of the funds or property of the company as shall be agreed upon between the contracting parties as sufficient, with the premiums that may become payable in respect of all existing policies, to enable the company from whose directors or managers the undertaking shall have been obtained, to comply therewith; and shall make such arrangements with the said directors or managers in regard to the said undertakings, as the said board of directors shall in their discretion think fit; and shall cause to be done and executed all such acts, deeds, and things as in the opinion of the said board of directors shall be necessary or advisable for carrying the said arrangements into effect: and, if any funds or property of the company shall remain after answering the purpose, and all other claims against the company, the directors shall cause the same, or so much thereof as shall not consist of money, to be sold, got in, or otherwise converted *into money, and shall cause the money arising from the said remaining funds or property to be paid and distributed, at such time or times as they shall think fit, to and amongst the shareholders and other holders of shares in the capital of the company, according to their respective rights and interest therein: Provided always, that no shareholder who shall not put in his claim, and if required, establish his title to the share in such surplus falling due to him within two years

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after the second or final extraordinary general meeting held for dissolving the company, shall be entitled to any share or interest therein, but the same shall be applied and divided, as part of the surplus capital of the company, for the benefit of and among the then ascertained parties among whom the rest of the capital shall be distributed."

Clause 102. "That, notwithstanding any such dissolution of the company as hereinbefore provided for, all the powers, privileges, rights, and duties of the shareholders of the company, and of the officers thereof (including the power to call and hold meetings of the company and of the board of directors), and the control thereby given over the officers of the company and through the medium of such meetings, and including the power to call for and enforce the payment of further instalments, shall, until all claims and demands shall have respectively been satisfied or provided for as aforesaid, and until the final division shall have been made of the residue, if any, of such moneys as aforesaid, remain and continue in full power so far as the same may be necessary for the winding up the concerns of the company, and for enabling the directors to dispose of the funds and property of the company, and to satisfy and provide for such claims and demands, and to make such payment and distribution as aforesaid."

A deed of dissolution of The Accumulative Life Fund *and General Assurance Company was also put in. This deed bore [*158 date the 20th of December, 1855, and was made between the company of the first part, certain shareholders of the second part, and one Hawkins of the third part: and it provided, amongst other things, that the parties of the second part should take shares in the Anglo-Australian and Universal Family Life Assurance Company; that a proper deed of assignment should be executed, by which the Accumulative Life Fund and General Assurance Company should assign and make over all their business, goodwill, contracts, moneys, and securities, and all other property to and for the Anglo-Australian and Universal Family Life Assurance Company, and that the former company should be amalgamated or united with the latter, and should cease to exist as an independent company from the 3d of June, 1856.

The deed of assignment, executed in pursuance of the last-mentioned deed, contained a covenant by the Anglo-Australian and Universal Family Life Assurance Company to allot to the shareholders of the Accumulative Life Fund and General Assurance Company shares in the Anglo-Australian and Universal Family Life Assurance Company, paid up, in full, or in part, as the case might be; and it was declared to be the intention of all parties to the deed, that the sums paid by the shareholders of the Accumulative Life Fund and General Assurance Company shares should be represented by a like amount in principal of allotted shares; and also an agreement by the Anglo-Australian Company and Universal Family Life-Assurance Company to take upon themselves the liabilities of the Accumulative Life Fund and General Assurance Company as set forth in the schedule thereto, and all contingent liabilities upon policies of insurance granted by the last-mentioned company, and existing on the 3d of December, 1855.

*On the part of the defendants, it was insisted that the declaration disclosed no cause of action, and that they were justified [*159

by the terms of the deed of settlement in entering into the arrangement they had done.

The learned judge, without expressing any opinion, directed a verdict to be entered for the plaintiff for the amount of the claim, reserving leave to the defendants to move to enter a verdict for them, or a nonsuit, if the court should be of opinion that the action was not maintainable."

Petersdorff, in due course, obtained a rule nisi accordingly, "on the ground that the defendants were not liable and had not in law or in point of fact committed any breach of the contract as alleged, or otherwise done any act which could confer a right of action upon the plaintiff.

Atherton, Q. C., and *David Keane*, now showed cause.—By the terms of the policy, the plaintiff is entitled to receive the sum insured out of the funds of the company, and therefore the company are bound to maintain those funds in all their integrity so as to meet the plaintiff's claim when it shall arise; and, having by their own wrongful act put it out of their power to perform their contract in this respect, they are clearly liable to an action. The language of the policy does not so qualify the terms of the insurance as to make the assured depend even upon a regular dissolution of the company. The words "according to the provisions of the deed of settlement" have reference merely to the regulating the mode of payment. But here it does not appear that the requisite steps for that purpose were taken pursuant to the 100th section of the deed of settlement. [WILLIAMS, J.—Does not the question *160] resolve itself into this,—whether the policy *amounts to an implied covenant on the part of the company to carry on the business?] Unless, at all events, it is dissolved in conformity with the provisions contained in the deed of settlement. By the deed of assignment, of the 4th of June, 1856, the defendants have parted with all they possessed, and conveyed it to the Anglo-Australian company. Besides, the plaintiff has a further interest in the company being kept alive; for, by the 82d clause of the deed of settlement, it is expressly provided that the shareholders shall participate in the profits. [COCKBURN, C. J.—What damages do you say you are entitled to?] The value of the policy, upon the supposition that everything will go on right, and that the funds of the company will be sufficient in 1874 to meet the claim,—which would readily be ascertained by an actuary.

Byles, Serjt., and *Petersdorff*, in support of the rule.—There is no precedent for an action of this kind: it is completely a case of the first impression; an action quia timet. It is not an action against the directors, but against a quasi corporation created under the 7 & 8 Vict. c. 110. This is substantially a case of mutual assurance: it is like the case of a member of a firm suing his copartners in a court of law for malversation in the partnership affairs. That which has been done,—the dissolution of the company,—has been rightly done, or it has been done wrongfully: if the former, it is not what the plaintiff complains of: if the latter, the corporate body, the shareholders, are not liable; the action should have been brought against the directors. If the seal of the corporation has been wrongfully put to the deed of dissolution, it is altogether ultrà vires, and cannot have the effect of dispossessing the company of its funds. [COCKBURN, C. J.—The policy contains no

reference to any power of *amalgamation or dissolution.] It refers to the deed of settlement, and therefore the holder is [*161 bound to take notice of the provisions of that deed: The Royal British Bank *v.* Turquand, 5 Ellis & B. 248 (E. C. L. R. vol. 85): and the deed, in the 101st clause, contains as ample powers as it is possible to conceive, to enable the directors to transfer all the property, rights, and liabilities of the company to another company. The plaintiff enters into the contract with full knowledge of that provision. There is no such implied covenant on the part of the company, as is suggested, to keep the funds intact. [COCKBURN, C. J.—The argument on the other side is, that, inasmuch as by the terms of the policy the holder is to look only to the fund, that raises an implied covenant on the part of the company not to do anything during the subsistence of the policy which shall have the effect of detracting from that fund. The questions seem to me to be these,—first, is there such an implied covenant?—secondly, if there be, have the company broken it?—thirdly, has the time arrived at which the plaintiff has a right to complain of the breach?] To what extent is the implied covenant to go? How is it to be defined? What are the obligations of the company with reference to the fund, beyond and different from the terms of the policy? [WILLIAMS, J.—Suppose a judgment obtained against the company, could it be enforced under the provisions of the 7 & 8 Vict. c. 110? WILLES, J.—There is an express decision upon that point in the negative: Halket *v.* The Merchant Traders' Ship, Loan, and Insurance Association, 13 Q. B. 960 (E. C. L. R. vol. 66).] The allegation in the declaration, that the defendants "wrongfully aliened, transferred, and disposed of all their funds and other property to another company, called the Anglo-Australian and Universal Family Life Assurance Company, contrary to the provisions of their deed of settlement," is disproved upon the *evi- [*162 dence; for, the schedule shows that part only of the shareholders assented to the transfer: the others would still remain liable to pay up their calls.

COCKBURN, C. J.—I am of opinion that the rule must be made absolute to enter a nonsuit in this case. Three questions seem to present themselves for our consideration,—first, whether there is any implied covenant on the part of the company to keep the funds so as to be available to answer the plaintiff's claim when it shall arise,—secondly, whether the company have done anything whereby that fund has become alienated so as not to be forthcoming to meet the plaintiff's claim,—thirdly, whether, assuming these two propositions to be decided in favour of the plaintiff, the time has arrived at which he is in a situation to maintain an action against the company.

Now, in the first place, it seems to me that no implied covenant does arise here. It has been contended that an implied covenant on the part of the defendants to continue the business of an insurance company, and to keep its funds available to answer claims upon policies, arises on that part of the policy which provides that "the capital stock and other the securities, funds, and property of the said company remaining, at the time of any claim or demand made, unapplied and undisposed of, and inapplicable to prior claims and demands in pursuance of the provisions of the said deed of settlement, shall alone be liable to answer and make good all claims and demands upon the said company, or otherwise,

under or by virtue of this policy; and that no director, officer, or shareholder of the said company, his heirs, executors, or administrators, shall, by reason of this policy, be in any wise individually or personally liable or subject to any such claims or demands, or be in any wise
*163] charged by reason thereof, beyond the *amount unpaid of his shares in the said capital stock, nor longer than he shall retain the same shares." It does not appear to me that any implied covenant such as is contended for arises from that proviso: it seems to me that all that was intended by it was, to protect the shareholders from individual and personal liability to the holders of policies. But for that proviso, the shareholders would have been liable personally in the event of the funds of the company proving insufficient to meet the claims on policies. It was evidently introduced, not for the purpose of enlarging the security and extending the remedy of the policy holder, but precisely the reverse,—for the purpose of depriving him of the right which the law would otherwise have given him of resorting to the individual shareholders, and of protecting the latter from personal responsibility.

Independently of that, it seems to me that the second proposition also fails: the company have not done anything to divest themselves of the fund; for, on looking at the deed of settlement, I do not find that it contains any provision for the amalgamation of The Accumulative Life Fund and General Assurance Company with any other company: the only provision I find is for the *dissolution* of the company in a given state of circumstances; and then follow certain directions as to what shall be done with the funds of the company after such a dissolution has been resolved on or effected, for the purpose of satisfying or securing the claims and demands on the company arising from assurances or other engagements. These provisions, which are contained in the 100th and 101st clauses, are here sought to be applied to the case of an amalgamation with another company. It seems to me, therefore, that the proceeding has been altogether ultrà vires, and that the plaintiff is not in a condition to contend that the funds of the company have been so aliened
*164] or transferred as to *prevent him from obtaining satisfaction of his demand thereout.

Further, supposing that both the above propositions could be decided in favour of the plaintiff, this further objection remains, that the time has not arrived at which he is entitled to enforce his claim against the company. If profits were made, he might, under the 81st clause of the deed of settlement, have been entitled to a share. But, independently of profits, the plaintiff or his representatives could have no claim upon the company until his policy becomes payable, viz. at his death, or in the year 1874. Until that event happens, or that period arrives, the action is, as it has been very properly designated, an action quia timet. Non constat, that, when the money becomes due, the amount will not be paid by the company. For these reasons I am of opinion that there ought to be a nonsuit.

WILLIAMS, J.—I am of the same opinion. At first sight I thought there might be some difficulty in disposing of this rule by entering a nonsuit, and that the proper course would be to arrest the judgment. But, upon further consideration, I am disposed to think that a nonsuit is the proper consequence of the failure of the plaintiff to sustain the allegation in the declaration, of the alienation of the funds of the com-

pany. The declaration, after setting out the policy, and averring that all things necessary were done to entitle him to sue, alleges for breach that the defendants, after the making of the policy, and whilst the same was in force, *wrongfully* aliened, transferred, and disposed of all their funds and other property to another company called The Anglo-Australian and Universal Family Life Assurance Company, contrary to the provisions of their deed of settlement, and then and from thence hitherto wholly and absolutely ceased to carry on *business according to their said deed of settlement or otherwise, or to accumulate or [*165 acquire, or to endeavour to accumulate or acquire, any funds or property, and thereby disabled themselves from performing their said contract with the plaintiff, &c. That is directly traversed by the plea. In order to sustain the declaration, I think it is necessary to interpret the word "wrongfully" as meaning that the alienation of the funds of the company took place under such circumstances as to make it wrongful and to give the plaintiff a cause of action. I am of opinion that there is nothing in the evidence to show that there was a wrongful alienation in that sense. Certainly the alienation would be wrongful, if there were implied in the policy a covenant on the part of the company that they would continue to carry on the business as it was carried on at the time the policy was effected. I assume that there was evidence of such an amalgamation or dissolution of the company as would prevent them from continuing to carry on their business under the terms of the deed of settlement. The question then is, whether there is any implied covenant,—there being none expressed,—that they will continue so to carry on their business. I am of opinion that there is not. Even if the deed of settlement were out of the question, it seems to me to be impossible to say that the policy amounts to anything more than a contract that the plaintiff or his executors shall receive the sum assured when the time for payment shall have arrived. It is difficult to imply from the circumstance of the policy holder being entitled to a share of profits, a contract on the part of the company that they will, in order to give him a better chance of profits, continue to carry on the business, supposing it should turn out to be disadvantageous to them to do so. The difficulty is still further increased by the consideration, that, if such a covenant *is to be implied, [*166 it might equally be implied that the company bound themselves to carry on the business with diligence. I see many cogent reasons why we should not infer a covenant such as is suggested. But when we look at the deed of settlement, we find it evidently contemplates the possibility of a dissolution of the company. I therefore think it is impossible that a covenant can be implied on the part of the company to continue to carry on the business, whether it be prosperous or not, in order that the plaintiff may not be excluded from the chance of receiving a share of profits, if profits should be made. The next question is, whether, supposing there is no such implied covenant, this declaration can be sustained on the view which has been presented, viz. that the conduct of the defendants amounts to a voluntary disabling of themselves from the performance of their contract. There is no doubt, that, if a party contracts to do a thing at a future period, and before the time arrives voluntarily does some act which renders it impossible for him to perform what he has contracted to do, the party contracted with is not bound to wait for the intervening period to elapse, but may at once bring his

action. Do the circumstances of this case support that view? It seems to me that they clearly do not. The fallacy lies in supposing that the terms of the policy are such that the contract cannot possibly be performed unless the business of the company continues to be carried on. That clearly is not so. All that the company contract to do is this, that they will, in a given event, pay the amount of the policy out of the capital stock and funds of the company, if sufficient: and it would be a good answer to a claim upon the policy, that the directors have no funds. It is manifest, that, if, when the policy became payable, the executors of the assured were to sue upon it, and the directors could show that
*167] *they had no funds wherewith to pay, the executors would have no ground of complaint. It may be that the step which the plaintiff complains of, viz. the amalgamation with the other company, may be most beneficial to him. How, then, can we say that the plaintiff is entitled to maintain an action, when, for, aught that appears, the contract may be performed when the time for its performance arrives? How can we say that the company have disabled themselves from performing their contract, when for anything that appears the money will be forthcoming at the proper time? This clearly is not like the case which was manifestly in the mind of the pleader when he drew this declaration, where the party who has contracted to do something at a future day, has by his own act precluded the possibility of its performance when the proper time arrives,—as, for instance, where a woman contracts to do an act which she can only do as a single woman, and by afterwards marrying renders it utterly impossible that she can perform her contract: in that case, of course, an action would lie at once for the breach. But that is a totally different case from this. For these reasons, I concur with the Lord Chief Justice in thinking that this rule should be made absolute to enter a nonsuit.

CROWDER, J.—I also am of opinion that there is no implied covenant on the part of the company to continue to carry on their business during the currency of the policy. I am likewise of opinion that the allegation that they wrongfully aliened, transferred, and disposed of all their funds, &c., to another company, has not been established; and that this action is premature. I rather incline to think that the proper course would be to arrest the judgment: but, as the rule is not so drawn, and the
*168] rest of the court seem to think *that there should be a nonsuit, I do not feel disposed to differ from them. The declaration, as it seems to me, discloses no cause of action at all. It proceeds upon the notion that an implied covenant on the part of the defendants to continue to carry on the business of the company, arises out of the contract on the face of the policy: and this implication is said to arise on two grounds,—first, because by the terms of the policy the funds of the company only are liable to make good the sum assured, and no personal responsibility attaches to the shareholders,—secondly, that, by the terms of the contract with the plaintiff, he is entitled to a participation in the profits of the concern, if profits are made. Upon neither of these grounds does it appear to me that any such covenant can be implied. As to the first, the proviso that the funds of the company only shall be liable to answer the claims on the policy, was evidently introduced for the purpose of limiting the right of the policy holder to a recourse to the general fund. In Hallett *v.* Dowdall, 18 Q. B. 2 (E. C. L. R. vol. 83), this

was held, upon a bill of exceptions tendered by me as counsel for one of the defendants, to be a good limitation as against the policy holder, and to preclude him from proceeding against the shareholders. The same point had been previously decided in Halket *v.* The Merchant Traders' Ship, Loan, and Insurance Association, 13 Q. B. 960 (E. C. L. R. vol. 66), and in other cases. I agree with the Lord Chief Justice in thinking that this limitation does not alter the case, or create by implication a contract which but for such limitation would not exist. This is perfectly an action primæ impressionis. It is the first time it has ever been contended that a policy holder has a right to come and say that something has been done by the assurers in breach of some implied contract in the policy. Then it is said that the holder of this policy is entitled to a share of *pro- [*169
fits. But that is only in an event which may or may not occur: and the fact of his being entitled to participate in profits does not necessarily give rise to a covenant on the part of the company that they will continue to be in a position to make profits. There is no pretence for saying that any such contract as is contended for arises upon the terms of the policy. Reference is made to the deed of settlement: and, when that is looked at, it will be found that there is a provision for the dissolution of the company, and for the transfer of its funds to another company. Upon the whole, therefore, it seems to me that there is no ground for contending that there is any implied contract on the part of the company to continue to carry on the business in the way suggested. Then, as to the allegation in the declaration that the defendants, whilst the policy was in force, wrongfully alienated, transferred, and disposed of all their funds and other property to another company, contrary to the provisions of their deed of settlement, and ceased to carry on business, and thereby disabled themselves from performing their contract with the plaintiff,—it seems to me that there is nothing in the evidence before us to show that this allegation was proved. It is urged that the defendants have in fact transferred their funds. I am disposed to think that the alternative put by my Brother *Byles*, is correct. Have the directors properly used the seal of the company so as to make a valid transfer? If they have, that is not an act done in contravention of the rights of the company: on the contrary, it is in accordance with the provisions of the deed of settlement. Take the other view: suppose the seal has been wrongfully affixed to the transfer deed, and not in accordance with the 101st clause of the deed of settlement, which assumes that there has been a valid dissolution of the company, that which has been done is altogether ultrà *vires, and the deed [*170
cannot operate a transfer of the funds. Then it may be asked what injury has the plaintiff sustained? I do not see that it has been shown he has sustained any. It may very well be that the company were in a bad way, and that the new company are much more likely to meet the claims of the policy holders when the proper time arrives. And as to the alleged right to share in profits, that is a very remote contingency. It seems to me that this has been very properly characterized as an action quia timet. When the event has happened upon which the money becomes payable under the policy, and not till then, the plaintiff or his representatives will be entitled to enforce it.

WILLES, J.—I also am of opinion that the rule must be made absolute for entering a nonsuit. It seems to me that there has been neither a

breach of contract committed nor an actionable wrong done by the defendants to the plaintiff. The complaint is, that the defendants have aliened and transferred their funds, and that they have ceased to carry on their business. The former affords no ground of action, unless it is a breach of some contract with the plaintiff. Then, is there any contract by the defendants with the plaintiff that they will not alien or transfer their funds? It appears to me that there is not. That which has been relied upon as creating an implied contract, superadded to the express contract which may or may not at a future time create a debt, is, the proviso that the capital stock, and other the securities, funds, and property of the company, unappropriated to any prior demand, shall alone be liable to make good the claim upon this policy. But, when that is looked at, with reference to the statute which regulates joint stock companies, the 7 & 8 Vict. c. 110, it will appear to be a proviso
*171] in *limitation of the right of the policy holder, and not as giving him any additional security. The 66th and 68th sections of that statute give a person who has a claim against the company a mode of enforcing it against individual shareholders, where satisfaction cannot be obtained by having recourse to the property of the company. Halket *v.* The Merchant Traders' Ship, Loan, and Insurance Association, 13 Q. B. 960, and other cases in the Exchequer,(*a*) have put a construction upon this proviso by which we are bound, viz. that it limits the right of the policy holder to have recourse to the funds of the company, and precludes him from proceeding by execution or otherwise against the individual shareholders. The other complaint is, that the company have ceased to carry on business, or to accumulate or acquire, or to endeavour to accumulate or acquire, any funds or property, and thereby disabled themselves from performing their contract with the plaintiff. The former ground of complaint affected both the amount secured by the policy and the bonus; but this affects the bonus only. By the terms of the deed, the directors are from time to time to ascertain whether any profits have been made, and out of those profits when ascertained they are to set aside a reserve fund, and to say whether any and what bonuses shall be added to the several policies. That leaves the amount and the time of payment of the bonus entirely in the discretion of the directors. If profits are made, and bonuses declared, the policy holder is to have the benefit of them. That is the whole contract that is expressed on the face of the policy; and I see none that is to be implied, to conflict with that. Coupling that with the provision enabling the
*172] *company to effect a dissolution, how is it possible to imply a contract that they will continue to carry on business for the benefit of the policy holders? Then, there being no such contract, have the directors been guilty of any tort? Have they in the course they have pursued committed any wrong against the plaintiff? I am of opinion that they have not. I think there is no ground for this action, and consequently that there must be a nonsuit.

Rule absolute accordingly.

(*a*) See Dawson *v.* Wrench, 3 Exch. 359,† and Reid *v.* Allan, 4 Exch. 326.†

HORLOR *v.* CARPENTER. *Nov.* 4.

The defendant addressed the following letters to the plaintiff:—"Feb. 13, 1851. I am Mrs. J.'s executor, and will pay you anything you may be pleased to advance Mr. T. A., from the first money I receive on his account." "Feb. 14, 1851. If you advance 100*l.* to Mr. T. A., or any other sum, I will undertake to pay you from the first money I have on his account, *upon having his authority so to do.*" The plaintiff having advanced T. A. 20*l.*, he addressed to the defendant an authority, as follows:—"Jan. 29, 1852. Please pay Mrs. H. the sum of 20*l.* by four instalments, namely, 5*l.* each quarter, from my estate, commencing from the 29th of September, 1852, until September, 1853: and, should any money be owing by me to her after that time, please to pay same as above:"—Held,—dubitante Williams, J.,—that this was a sufficient authority to the defendant to pay the plaintiff further advances beyond the 20*l.*

After verdict, the defendant's counsel insisted that the guarantee was not a continuing guarantee:—Held, that he was precluded from urging that point, on a motion for a new trial.

THE plaintiff in this action sued for 38*l.* 8*s.* upon a guarantee given by the defendant for advances made by the plaintiff for one Adams.(*a*)

The first count of the declaration stated, that the defendant, before and at the time of making the promises thereinafter mentioned, was the executor of the last will and testament of one Mrs. Jenkins, deceased, and, as such executor, under and by virtue of the provisions of the said will, had been and was accustomed and liable to pay over to one Thomas Adams certain rents *and moneys received and to be received by the defendant under the said will, for the use and behoof of the [*173 said Thomas Adams; and thereupon, and in consideration that the plaintiff would lend and advance to the said Thomas Adams moneys of her, the plaintiff, he, the defendant, promised the plaintiff, upon the said Thomas Adams giving the plaintiff authority to receive the amount from the defendant, to repay to the plaintiff any such sums as the plaintiff might so lend and advance from and out of the first money which he, the defendant, should receive on account of the said Thomas Adams, to wit, from and out of the first moneys to be by him thereafter received on account of the aforesaid rents and moneys, as and when he should receive the same, and to hold himself responsible to the plaintiff for the same: Averment, that the plaintiff, confiding in the said promise and undertaking of the defendant, did afterwards lend and advance to the said Thomas Adams divers large sums of moneys, in the whole amounting, to wit, to 58*l.* 8*s.*, and the said Thomas Adams did thereupon give to the plaintiff an authority to receive the said amount from the defendant, who then had due notice of the premises; and that the defendant afterwards received on account of the said rents and moneys 20*l.*, and paid the same to the plaintiff, but afterwards and before he received any further portion of the said rents and moneys, the defendant purchased of the said Thomas Adams all his interest of and in the said rents and moneys, and took an assignment of the same from the said Thomas Adams, and thereby disabled himself from performing his said contract with the plaintiff, according to the said terms thereof, and had ever since received, as they became due, the said rents and moneys in his own right, and the plaintiff had never yet been paid the residue of the said sum of 58*l.* 8*s.*, or any part thereof, out of the said rents and moneys, or otherwise.

*Sixth plea, to the first count,—that, after the making of the said alleged promise in that count mentioned, and before the loan [*174

(*a*) See Horlor v. Carpenter, 2 C. B. N. S. 56 (E. C. L. R. vol. 89).

or advance to the said Thomas Adams of the said several sums of money, or any part thereof, and before the said alleged purchase by the defendant, or any breach of his said promise, it was mutually agreed between the plaintiff and the defendant, that the defendant should be released and discharged from his said promise, and that the defendant, in consideration of the plaintiff advancing to the said Thomas Adams 100*l.*, or any other sum, should undertake to pay the same to her out of the first moneys he had on account of the said Thomas Adams, upon having his authority so to do; that the defendant did accordingly undertake and promise the plaintiff, that, if the plaintiff would advance 100*l.* to the said Thomas Adams, or any other sum, he would pay the same from the first money he had on account of the said Thomas Adams, upon having his authority so to do; and that the plaintiff did afterwards advance to the said Thomas Adams a sum of money, to wit, 20*l.*, and that the defendant did pay the same (being the said sum of 20*l.* in the declaration alleged to have been paid) to the plaintiff out of the first money he had on account of the said Thomas Adams, upon having his authority so to do, according to the true intent and meaning of his said last-mentioned promise. Issue thereon.

At the trial before Williams, J., at the second sitting at Westminster in Easter Term last, the following facts appeared in evidence:—In February, 1851, Thomas Adams, who was indebted to the plaintiff in the sum of 5*l.*, wishing to borrow further sums of her, told her that the defendant received certain rents for him, and that he would be responsible for the payment. The plaintiff accordingly applied to the defendant, who, in answer to her application, enclosed her a check *for 5*l.* in a letter dated the 11th of February, as follows:—

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"Madam,—Upon the payment of the enclosed, please return the bill as above, to yours respectfully, R. CARPENTER.

"P. S. If you wish to oblige Mr. Adams, by his giving an authority to receive the amount from me from his rents, I will pay it you, and hold myself responsible to you for the same."

Upon receiving this letter, the plaintiff, accompanied by Adams, called upon the defendant, who then wrote upon the back of it the following:—

"February 13th, 1851.

"Dear Madam,—I am Mrs. Jenkins's executor, and will pay you anything you may be pleased to advance Mr. Thomas Adams, from the first money I receive on his account. Yours, &c. R. CARPENTER."

The plaintiff again called on the defendant on the following day, when he gave her another letter as follows:—

February 14th, 1851.

"Dear Madam,—If you advance 100*l.* to Mr. Thomas Adams, or any other sum, I will undertake to pay you from the first money I have on his account, upon having his authority so to do. Yours, &c.,

R. CARPENTER."

Upon receiving this undertaking, the plaintiff from time to time advanced money to Adams, in the whole amounting to 20*l.*; and, on the 15th of August, Adams addressed a letter to the defendant as follows:—

"Dear Sir,—Please to pay to Mrs. Sarah Horlor the sum of 20*l.*, namely, 5*l.* each quarter, commencing the 29th of September, 1851, until the 29th of September, 1852, ending. THOMAS ADAMS."

*On the following day the defendant wrote to the plaintiff as follows:— [*176

"August 16th, 1851.

"Dear Madam,—I have received an authority from Mr. Adams to pay you 20*l.*, namely, 5*l.* per quarter, commencing at the Christmas quarter next; so that about a fortnight after each quarter you will be entitled to its receipt. Yours respectfully, R. CARPENTER."

Three of the instalments mentioned in that letter having been duly paid by the defendant, and the plaintiff having made further advances to Adams, the latter, on the 29th of January, 1852, sent him a letter as follows:—

"Sir,—Please to pay Mrs. Horlor the sum of 20*l.*, by four instalments, namely, 5*l.* each quarter, from my estate, commencing from the 29th of September, 1852, until September, 1853, ending: and, should any money be owing by me to her after that time, please to pay same way as above. Yours, &c., THOMAS ADAMS."

On sending the plaintiff the last instalment of the first 20*l.*, the defendant wrote to the plaintiff, acknowledging the receipt of the last-mentioned authority, in these terms:—

"January 30th, 1852.

"Dear Madam,—I enclose half 5*l.* note on account of Thomas Adams, which please acknowledge, and the other half shall follow. I have received an order from Mr. Adams to hand over 20*l.* after this shall have been paid; but, of course, I cannot hold myself responsible only so far as he is empowered to receive same under the will. Yours truly, R. CARPENTER."

The plaintiff made further advances to Adams to the extent of 18*l.* 8*s.* beyond the second 20*l.*; but, the *defendant, having in the meantime purchased Adams's interest under Mrs. Jenkins's will, he refused to pay either the second 20*l.* or the subsequent advances. [*177

Parol evidence was offered, and, not being objected to, received, for the purpose of showing, that, at the time of giving the letters which constituted the guarantee, it was the understanding of all the parties that advances were to be made from time to time by the plaintiff to Adams.

The only point urged on behalf of the defendant, was, that the document dated the 14th of February, 1851, was given in substitution of the letter of the 13th, and that, an authority once given, the guarantee was exhausted; and that, at all events, it could not apply to the 18*l.* 8*s.* last advanced.

The learned judge left it to the jury to say whether the letter of the 14th of February, 1851, was intended to be a substitution for that of the 13th, or whether the two were to be concurrent: and he told them, that, in estimating the damages, they might take into their consideration the possibility of Adams dying or parting with his interest under the will to a stranger before the whole of the payments should have become due.

The jury returned a verdict for the plaintiff, damages 30*l.* The learned judge thereupon gave the defendant leave to move to reduce the verdict by the 18*l.* 8*s.*, if the court should be of opinion that the guarantee did not extend to that.

It was then submitted on the part of the defendant that the learned judge ought to have directed the jury to find for him, on the ground

that the letter of the 13th of February, 1851, was not a continuing guarantee. But, as this point had not been taken at the proper time, his Lordship refused to reserve it.

*178] *Prideaux*, in Easter Term last, obtained a rule nisi *for a new trial, on the ground of misdirection, amongst other things, in telling the jury to find for the plaintiff if they were of opinion that the second undertaking was not intended to be substituted for the first; or to reduce the damages by the sum of 18*l.* 8*s.*, or such other sum as the court should direct, on the ground that the judge ought to have withdrawn the last amount advanced, to wit, 18*l.* 8*s.*, from the consideration of the jury.

Holl now showed cause.—The letter of the 13th of February, 1851, and the letter endorsed on it, manifestly contemplated several transactions, and were not intended to be limited to a single advance. If the words are susceptible of that construction, the maxim "verba fortius accipiuntur contrà proferentem" must apply. In Mason *v.* Pritchard, 12 East 227, an engagement to be answerable to the plaintiff "for any goods he *hath* or *may* supply W. P. with, to the *amount* of 100*l.*," was held to be a continuing guarantee to that extent for goods which might at any time be supplied by the plaintiff to W. P. until the credit was recalled,—the court saying that the words "were to be taken as strongly against the party giving the guarantee as the sense of them would admit of." That principle of construction is approved of in Mayer *v.* Isaac, 6 M. & W. 605,† where the contrary doctrine laid down by Bayley, B., in Nicholson *v.* Paget, 7 C. & M. 68,† 3 Tyrwh. 164, is distinctly repudiated, Alderson, B., saying,—"Undoubtedly, the generally received principle of law, is, that the party who makes any instrument should take care so to express the amount of his own liability, as that he may not be bound beyond what it was his intention that he should be; and, on the other hand, that the party who receives the instrument, and parts

*179] with his goods on the faith of it, should rather have a *construction put upon it in his favour, because the words of the instrument are not his, but those of the other party." So, in Merle *v.* Wells, 2 Campb. 413, Lord Ellenborough says,—"If a party means to be surety only for a single dealing, he should take care to say so." And in Bastow *v.* Bennett, 3 Campb. 220, the same learned judge ruled that an undertaking to be answerable to a given amount for *any* goods supplied by A. to B., after goods to that amount have been supplied and paid for, still remains in force while A. supplies B. with goods on the same footing, until revoked by the surety. It is impossible to say that the document in the present case is not fairly susceptible of a construction which would exclude its being limited to a single loan and a single authority. [COCKBURN, C. J.—The words are in the singular number,—"an authority to receive *the amount:*" it is at least ambiguous.] "Amount" means "The sum total of two or more particular sums or quantities," Webster; "The sum total; the result of several sums or quantities accumulated," Johnson; "The total of several articles in an account," Bailey. The surrounding circumstances and the subsequent conduct of the parties may be taken into account to explain any latent ambiguity in the instrument itself. The words "from the *first* money I receive on his account" mean nothing more than that the contemplated advances shall form the first charge upon the money which the defendant

may from time to time receive on Adams's account. If the language of the guarantee is so ambiguous that the court cannot see upon the face of it whether it applies to one loan or to several, then parol evidence was admissible to explain it: Haigh *v.* Brooks, 10 Ad. & E. 309, 323 (E. C. L. R. vol. 37), 2 P. & D. 477, 4 P. & D. 288; Butcher *v.* Steuart, 11 M. & W. 857;† Goldshede *v.* Swan, 1 Exch. 154.† [WILLES, J.—In those cases, the parol evidence was received, not for *the purpose of showing the extent of the guarantee, but merely to [*180 explain what the consideration was.] If parol evidence be admissible to explain the one, on the same principle it must be admissible to explain the other. The rule is laid down generally. [WILLIAMS, J.—You may always look at the surrounding circumstances, to ascertain what the parties mean. The case of equivocation depends upon a different principle: for instance, where a man gives a legacy to "his cousin John," and it appears that he has *two* cousins bearing that Christian name, parol evidence may be given to show which of the two was the object of his bounty. CROWDER, J.—Here, the evidence was not objected to. Parties cannot be allowed to impeach verdicts upon grounds not urged at the time of the trial.] That principle was acted upon in a recent case in this court, of Martin *v.* The Great Northern Railway Company, 16 C. B. 179 (E. C. L. R. vol. 81.) [WILLES, J.—And still more recently in Jones *v.* The Provincial Insurance Company, antè, p. 65. WILLIAMS, J.—If the point as to whether the guarantee was continuing or not had been taken at the trial, I certainly should have reserved it. I could not have put it to the jury. COCKBURN, C. J.—It is essential to the administration of justice that certain rules should be adhered to. At the trial, the defendant's counsel relied only upon the point raised by the sixth plea, viz. that the letter of the 14th of February, 1851, was given in substitution for that of the 13th; and the direction to the jury proceeded upon the assumption that that was the only issue relied upon. It was never suggested until after that had been disposed of by the finding of the jury, that there was a further point, viz. that the letter of the 13th did not support the declaration. The defendant is clearly precluded by every principle of justice and convenience from relying upon that point now.] As to the second point, the defendant must, to *succeed here, make out that the [*181 letter of the 14th of February, 1851, was necessarily a substitution in point of law for that of the 13th, and that the two could not co-exist. [*Kinglake*, Serjt.—If the court is of opinion that the first question is not open to the defendant now, it will be useless to discuss the second: we went to the jury upon it.] Then, as to the damages,—that question depends upon the construction of the second authority, of the 29th of January, 1852, which was in these terms:—"Please to pay to Mrs. Horlor the sum of 20*l.* by four instalments, namely, 5*l.* each quarter, from my estate, commencing from the 29th of September, 1852, until September, 1853, ending. *And, should any money be owing by me to her after that time, please to pay same way as above.*" That was a distinct authority from Adams to the defendant, not merely to pay the second 20*l.* advanced, but any further sums which might thereafter be advanced. This authority was assented to and acknowledged by the defendant; and it was proved that the plaintiff upon the faith of it advanced Adams 20*l.* and further sums amounting to 18*l.* 8*s.*

beyond. The whole of these advances she clearly had a right to look to the defendant for.

Kinglake, Serjt., and *Prideaux*, in support of the rule as to the reduction of damages.—The authority the parties contemplated manifestly was, an authority to be given after the money was advanced; it could not have been intended that the defendant's undertaking should operate as a floating guarantee for future advances to an indefinite extent. In Nicholson *v.* Paget, 1 C. & M. 68,† 3 Tyrwh. 161, the correct rule is laid down, notwithstanding the observations which have been made upon it. Bayley, B., in delivering the judgment of the court says: "This is a contract of guarantee, which is a contract of a peculiar description; *182] *for, it is not a contract which a party is entering into for his own debt, or on his own behalf; but it is a contract which he is entering into for a third person: and we think that it is the duty of the party who takes such a security to see that it is couched in such words as that the party so giving it may distinctly understand to what extent he is binding himself." And, again, at the conclusion of his judgment, he says: "It is not unreasonable to expect from a party who is furnishing goods on the faith of a guarantee, that he will take the guarantee in terms which shall plainly and intelligibly point out to the party giving the guarantee the extent to which he expects that the liability is to be carried." [WILLES, J.—That is not the law of England (though it is the law of France) since the case of Mayer *v.* Isaac, 6 M. & W. 605,† where this point was well considered, and where Alderson, B., expressly repudiates Mr. Baron Bayley's doctrine, saying,—"If I were obliged to choose between the two conflicting principles which have been laid down on this subject, I should rather be disposed to agree with that given in Mason *v.* Pritchard, 12 East 227, than with the opinion of Bayley, B., in Nicholson *v.* Paget."] The obvious construction of the authority of the 29th of January, 1852, is, that the defendant was to pay the 20*l.* already advanced, and no more,—the latter words of that document, "and, should any money be owing by me to her after that time, please to pay," &c., evidently had reference to the contingency of the rents not realizing the 5*l.* a quarter, so as to cancel the debt within the period mentioned. The authority to pay must be precise, and must specify the sum to be paid. [WILLIAMS, J.—In short, you say the defendant is entitled to have an authority such as is beyond all doubt or dispute.] Precisely so. The damages ought therefore to be *183] reduced by the sum of 18*l.* 8*s.*, or in the same *proportion as that sum bears to the amount assessed by the jury.

COCKBURN, C. J.—I am of opinion that this rule must be discharged. It appears that the defendant undertook, in consideration of the plaintiff's making advances to one Adams, to repay the same out of certain trust-moneys coming to his hands for Adams, upon Adams giving him an authority so to do; that the plaintiff accordingly advances 20*l.* to Adams, who thereupon gives the defendant an authority in these terms:—"Please to pay Mrs. Horlor the sum of 20*l.* by four instalments, namely, 5*l.* each quarter, from my estate, commencing from the 29th September, 1852, until September, 1853, ending. And, should any money be owing by me to her after that time, please to pay same way as above." It is suggested, on the part of the defendant, that the latter words of the authority mean, that, if the rents should prove in-

sufficient to pay the 5*l.* a quarter during the period mentioned, the defendant is to make good the deficiency out of the rents subsequently accruing. That is certainly a very ingenious construction; but I do not think it is what the parties meant. There is nothing to show that the parties ever contemplated it as at all doubtful that the rents received by the defendant on account of Adams within the stipulated time would be sufficient to cover the sum already advanced: and it is much more likely that they contemplated that further sums would be advanced. If, after the defendant had made payments on Adams's account upon the faith of that authority, Adams had sought to recover the money from the defendant, I think that letter would be a sufficient answer to his claim. I therefore think the authority was sufficient to cover subsequent advances as well as the 20*l.*, and consequently that there is no ground for reducing the damages.

*WILLIAMS, J.—I must confess I should, but for the strong opinions entertained by my Lord and the rest of the court, have entertained some doubt as to the sufficiency of the authority beyond the 20*l.* I should have thought the authority ought to have specified the amount, and not have thrown upon the defendant the duty of ascertaining whether or not the amount claimed was correct. As, however, the rest of the court are unanimous, I will not stand out. [*184

CROWDER, J.—I concur with the Lord Chief Justice in thinking that this rule should be discharged, and for the reason he has assigned. The defendant engages to repay the plaintiff, out of the moneys to be received on Adams's account, any money she may advance to Adams, upon Adams giving him authority so to do,—that is, such an authority as will hold him harmless. I see no reason why the authority should specify the amount: it seems to me to be sufficient if he gave an authority that would be binding as between him and the defendant. There is nothing on the face of the letter of the 29th of January, 1852, at all indicative of any doubt that enough would accrue from the rents to pay the 5*l.* quarterly: nor do I see any reason why the words which follow should not extend to future advances beyond the 20*l.*

WILLES, J.—I am of the same opinion. The defendant undertakes to repay the plaintiff any advances she may make to Adams out of the money he is to receive on Adams's account, on receiving from Adams an authority so to do. It seems to me that such authority would be sufficient if it were in these words merely,—"I authorize you to pay to Mrs. Horlor the amount due to her." It certainly would be more convenient that the authority should specify the sum to be paid: *but, if the defendant required that, he should have expressly stipulated for it. It appears to me that Adams's letter of the 29th of January, gives the defendant all the authority he required; and I cannot adopt the construction which has been suggested. I may add, that I do not think my Brother *Kinglake* sustained any prejudice by the concession he is supposed to have made at the trial. [*185

Rule discharged.

FLOWER *v.* GARDNER. *Nov.* 17.

In an action for goods sold, the delivery having been proved by the plaintiff's carman, the defendant's wife and servants were called to prove that the goods had been paid for on delivery,—the latter swearing that they had on each occasion paid the carman, having received the money for that purpose, sometimes from the defendant's wife, and *sometimes from the defendant himself*,—and the former, that, as to part, she had given the money to the servants for the purpose of making the payments. On the trial, the defendant was in court, but was not called as a witness until observations had been made by the plaintiff's attorney on account of his not being put into the box. A verdict having been found for the defendant, and the master having on taxation declined to allow him the costs of his attendance,—the court directed a review; holding that the defendant's attendance as a witness was under the circumstances advisable and proper, and that it did not lie in the plaintiff's mouth to say that it was not necessary.

THIS was an action brought by the plaintiff, a brewer, to recover from the defendant the sum of 8*l.* for beer supplied by the former to the latter in London; the defence being, payment before action brought.

The cause was tried before the Secondary of London. The plaintiff's carman having proved the delivery of the beer, the defendant's wife and servants were called,—the former for the purpose of proving that she had from time to time as the beer was delivered given her servants money to pay for it,—and the latter to prove that the beer had always been paid for on delivery, for which purpose they had received the
*186] money, sometimes *from the defendant himself, and sometimes from his wife.

The defendant was in court, and his attorney having closed his case without calling him, the plaintiff's attorney asked him if he did not mean to put his client into the witness-box: the defendant's attorney thereupon requested the defendant to step into the box, but declined to examine him, and intimated to the plaintiff's attorney that he might do so if he pleased: this the plaintiff's attorney declined to do, and the jury returned a verdict for the defendant.

Upon the taxation of costs, there was an item in the bill of 15*l.* 10*s.* for the travelling expenses and attendance of the defendant, who, it appeared, came from a distance of two hundred miles, and who was sworn by his attorney to be a material and necessary witness. The master having disallowed this,

Manisty, on a former day in this term, obtained a rule nisi for a review of the taxation.

Prentice now showed cause.—The costs of the defendant's attendance were properly disallowed. The mere fact of his attorney choosing to swear that he believed him to be a material and necessary witness will not deprive the master of the right to exercise his discretion as to the number of witnesses he ought to allow. The fact of his omitting to call him in the first instance, and afterwards declining to put any questions to him, clearly showed that his attendance was altogether uncalled for and unnecessary. [COCKBURN, C. J.—The course taken by the plaintiff's attorney rendered it highly proper and necessary that the defendant should be tendered as a witness. Having challenged his attorney to call him, with a view to prejudice the minds of the jury, does it lie in
*187] the plaintiff's mouth *to say that he was not a necessary witness?] That might be a fair topic to urge before the master; but, having taken all the circumstances into consideration, including the smallness

of the demand, and having exercised his discretion upon them, the court will not interfere with his decision.

Manisty, in support of his rule.—The principle of taxation is not to be influenced by the smallness of the amount of the demand. It is enough to say that the plaintiff's own attorney by his conduct showed that he considered the defendant's presence necessary.

COCKBURN, C. J.—I am of opinion that this rule should be made absolute. I think it would have been most unsafe to have presented the defendant's case to the jury without his evidence. The defence was, that the beer had all been paid for by the defendant's servants to the carman of the plaintiff at the time of delivery. If the defendant's servants only had been called, there would have been merely their oaths against the oath of the carman: and we all know the inclination of juries to find for the plaintiff where it is a mere balance of evidence. For the purpose, therefore, of corroborating the testimony of the servants, it was material to show that they were furnished with the money, as it was natural that they should be, either by the master or the mistress. It appeared that some had been supplied by each. Suppose the wife only had been called, and had proved that she gave her servants part of the money, would not the plaintiff's attorney have claimed, and probably succeeded in obtaining, a verdict for the rest? It clearly, therefore, would not have been safe to omit to have the defendant in court. Besides, it is impossible to shut one's eyes to the fact, that, the defendant's case having been closed *without his being called, the plaintiff's advocate took advantage of that circumstance, and observed upon his being present in court and not being called; and so he made him a witness. Under all the circumstances, I think it but reasonable and right that the defendant should have been present, and that he should be allowed his expenses. [*188

WILLIAMS, J.—I am of the same opinion. The fair test is, what would counsel have recommended if advising on the evidence? I cannot help thinking that he would under the circumstances have considered the defendant's presence necessary: and I think the defendant's attorney would have failed in his duty to his client if he had not had him in court. If so, it follows that the item in question does not fall within the class of extra costs, but was an expense created by the attendance of a witness the defendant was bound to have present.

CROWDER, J.—The question is, whether it was prudent and proper for the defendant to be in attendance at the trial. I think it was. The very fact of the claim being a small one must have satisfied the defendant that the plaintiff would have supported his case by the perjury of his carman. It is not for the plaintiff to complain of the expense incurred in the defence against a demand which had already been paid. Besides, the plaintiff's attorney challenged the defendant's being put in the witness-box. After that, I think it hardly lay in his mouth to say that he was not a necessary and proper witness.

WILLES, J., concurred. Rule absolute.

*189] *HODGKINSON *v.* FERNIE and Another. *Nov.* 25.

The decision of an arbitrator, whether a lawyer or a layman, is binding on the parties both in matters of law and in matters of fact, unless there has been fraud or corruption on his part, or there be some mistake of law apparent on the face of the award, or of some paper accompanying and forming part of the award.

Thus, where a verdict was taken for the plaintiff, subject to the award of an arbitrator *as to the amount of damages*, and his award included an amount of damages which (it was assumed) the plaintiff was not legally entitled to in the action,—the court refused to interfere.

And, held, that it was not a case for remitting the matter back to the arbitrator for reconsideration, by virtue of the 8th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125),—that clause being intended only to apply to cases where before the act such a course might have been adopted under the provision in the submission or order of reference usually known as "Mr. Richards's clause."

THIS was an action to recover damages by reason of the plaintiff's ship "Sultana" having been run down by the defendants' ship "Courier." The declaration stated "that the defendants, by their servants, so negligently and unskilfully navigated and managed a ship of the defendants called the Courier, then being navigated and managed by their servants, that the said ship struck and came into collision with the plaintiff's ship the Sultana, by which the said last-mentioned ship was greatly and permanently damaged, and the plaintiff was put to and incurred great expense in repairing her, and was deprived of the use of her a long time, and thereby lost great profits which he would otherwise have made by her."

The cause came on for trial before Cockburn, C. J., at the sittings in London after Michaelmas Term, 1856, when a verdict was taken for the plaintiff for the damages laid in the declaration, costs 40*s.*, subject to a reference, as to the amount for which the verdict should finally stand, to Mr. Richards, the average-stater; with a proviso, that, in the event of any application to the court upon the subject of the order, the reference, or the award or certificate, the court might (if it should think fit) refer back to the arbitrator the whole or any part of the matter of the order, or the award or certificate, upon such terms and with such directions as the court should think proper. The arbitrator by his award
*190] ordered that the verdict should stand for *713*l.* 8*s.* 2*d.*, which included a sum of 496*l.* 6*s.* 8*d.* which the arbitrator allowed in respect of a deduction of 710*l.* 14*s.* 5*d.* which the commissioners of the Admiralty had made from what the plaintiff would have been entitled to for the hire of the vessel, for the period of her detention while under repair at Constantinople.(*a*) This deduction was made under the following proviso in the charter-party:—

"Provided always, and it is hereby agreed and declared, that, if at any time or times hereafter, it shall be made to appear to the said commissioners for the time being that any loss of time, breach of orders, or neglect of duty by the said master or other person having charge of the said ship, hath happened during the aforesaid service, or that, from any deficiency of men, want of provisions or stores, or *any defect or cause whatsoever*, the said ship became incapable to perform the service contracted for, then and in every such case it shall and may be lawful to and for the said commissioners for the time being to make such abate-

(*a*) These repairs had been rendered necessary in part by a collision with another vessel called the "Kangaroo."

ment, by way of mulct out of the hire and freight of the said vessel, as they shall adjudge fit and reasonable; and that a similar mulct may also be imposed for every deficiency of complement which shall be satisfactorily proved to have taken place, anything herein contained to the contrary thereof notwithstanding: And it is further agreed, on the part of Her Majesty, that, if the said ship shall happen to be burnt, sunk, or taken by the enemy during the aforesaid service, and it shall be made to appear to the satisfaction of the said commissioners for the time being that the same did not proceed through any fault, neglect or otherwise in the master or the ship's company, and that they made the utmost *defence they were able, the value of her shall be paid for by Her Majesty according to the valuation made thereof on declaration by officers of the said commissioners, reasonable wear and tear first deducted." [*191

By the charter-party, which bore date the 22d of March, 1854, it was also, amongst other things, provided "that the said ship shall be strong, firm, tight, staunch, and substantial both above water and beneath, and in every respect seaworthy during the time she shall be employed under this charter-party;" and that the owners "shall be allowed and paid for the hire and freight of the said ship at the rate of 82*s.* 5*d.* per ton per calendar month for the number of tons above mentioned, during such time as the said ship shall be continued in Her Majesty's employ, *and shall duly perform the service for which she is hereby engaged.*"

Quain, on a former day in this term, obtained a rule calling upon the plaintiff to show cause "why the award or certificate on the assessment of damages by the arbitrator should not be set aside, or referred back to the arbitrator, or why the damages so assessed by him should not be reduced by the sum of 495*l.* 6*s.* 8*d.*, on the ground that the same was not recoverable as *legal* damages, and had been improperly allowed by him as a part of the said damages." He submitted that the damage in question was not a damage that could be recovered on the declaration as framed, the deduction having been improperly made by the commissioners of the Admiralty, and improperly submitted to by the plaintiff: and he adverted to the opinion thrown out by Pollock, C. B., in Greenland *v.* Chaplin, 5 Exch. 243, 248,† where that learned judge says,—"I am desirous that it may be understood that I entertain considerable doubt whether a person who is guilty of negligence is responsible for all the consequences which may under *any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person could have anticipated. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this,—that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur." [*192

Byles, Serjt., and *Needham*, now showed cause.—The plaintiff's vessel, the Sultana, it appears, was chartered by the Admiralty as a transport, at a certain rate per ton per month, so long as she should duly perform the service for which she was engaged; and, whilst so employed in the Black Sea, she was run into and damaged by the defendants' ship Courier, and was several months detained at Constantinople under repair. The sum mentioned in this rule is the amount deducted by the

commissioners of the Admiralty from the hire of the vessel for the time she was so under repair and disabled from performing service; and the plaintiff claimed before the arbitrator, to whom the damages were referred, to be entitled to recover that sum as a portion of the damages consequent upon the collision. [COCKBURN, C. J.—I presume you would hardly contend, that, if the vessel were disabled by storm, the Admiralty would be entitled to withhold the payment during the period necessarily occupied in repairing the damage?] It is submitted that they might. [COCKBURN, C. J.—Where there was no default on the part of the owner or his servants?] Yes. [WILLES, J.—Paradine *v.* Jane, Aleyn 27, seems to show that the deduction was properly made; for, "when the party by his own contract creates a duty or charge upon himself, he
*193] *is bound to make it good, if he may, notwithstanding any accident or inevitable necessity, because he might have provided against it by his contract."] The true answer to this rule, however, is, that the court has no jurisdiction in the matter. The parties, by submitting the question of damages to the decision of Mr. Richards, have agreed to forego the jurisdiction of the court and jury, and to substitute the judgment of the arbitrator, without any power of appeal. They might, if they had thought fit, have stipulated that the arbitrator should raise any points of law for the determination of the court: but they have not done so. [COCKBURN, C. J.—Suppose the arbitrator had awarded damages in respect of a cause of action not within the declaration,—would you say the court had no jurisdiction to inquire into the matter?] That would be a case of excess of jurisdiction: but here the complaint is, that he has erred in a matter which is within his province; and that cannot be reviewed by the court. It is only where misconduct is imputable to the arbitrator, or some obvious mistake of law appears upon the face of the award, that the court can interfere. In the case of In re Hall and Hinds, 2 M. & G. 847 (E. C. L. R. vol. 40), 3 Scott N. R. 250, this court set aside an award on the ground of *gross mistake* on the part of the arbitrators,—so gross, as Tindal, C. J., observed, as to amount to *misconduct*. Parke, B., observing upon that case in Phillips *v.* Evans, 12 M. & W. 309,† says: "I do not mean to say that the decision of the Court of Common Pleas was not correct, as it was founded on facts which showed a clear mistake; but I feel extremely unwilling to enlarge that rule. Although we may possibly do some injustice in particular cases, I think it better to adhere to the principle of not allowing awards to be set aside for mistakes, and not to open a door to inquire into the merits, or we shall have to do so in almost every
*194] case." In this latter case, the *arbitrator himself admitted that he had made a mistake, and wished to reconsider the matter: but the court, notwithstanding, adhered to the general rule of not allowing awards to be set aside for mistakes. Again, in Fuller *v.* Fenwick, 3 C. B. 705 (E. C. L. R. vol. 54), this court distinctly decided that they would neither set aside nor refer back an award for an objection in point of law not apparent on the face of it,—as, upon a suggestion that the arbitrator improperly treated as a penalty that which was by the express contract of the parties stipulated and ascertained damages; and that whether it was the award of a professional or of a lay arbitrator. Wilde, C. J., there says: "The question as to how far the court will interfere to correct the mistake of an arbitrator in fact or in law, has

been presented in every possible shape. In some of the cases, the discussion has proceeded upon a supposed difference,—where a matter of law was in question,—between a lay and a professional arbitrator. Lord Ellenborough first,(*a*) and, subsequently, all the judges, repudiated any such distinction, holding, that, where the parties have thought fit to withdraw from the decision of the ordinary tribunals, and have selected their own judge, they must be content to abide his judgment. The question has also been discussed in cases where some point of law has suddenly arisen in the course of the inquiry, and where, though the matter was present to the mind of the arbitrator, but little time was afforded for consideration; and the courts have said, that, whether the arbitrator was a professional man or a layman, they would not inquire whether his conclusion was right or not, unless they could, upon the face of the award, distinctly see that the arbitrator, professing and intending to decide in accordance with law, had unintentionally and *mistakenly decided contrary to law." And Maule, J., says: [*195
"If the case had been left to follow the ordinary course, it would have been decided, as to the facts, by a jury, and, as to the law, by the judge, with an ultimate appeal to a court of error. The parties, for some reason, thought fit to withdraw the case from that mode of trial, and to refer the whole to an arbitrator, thinking, probably, that the facts would be more conveniently ascertained, and the law more conveniently determined, by one from whose judgment there was no appeal, and that an arbitrator would, in the particular case, be a better judge of the facts than a jury, and of the law than the court. It is quite true that it is sometimes advantageous to have a matter decided by a person possessing the smallest possible knowledge of law. These considerations have, in modern times, induced the courts to deal much more liberally with awards than was formerly their practice, and, generally speaking, to hold them to be final, unless some substantial objection appears upon the face of them." The same principle was acted upon in Hagger *v.* Baker, 14 M. & W. 9,† where Pollock, C. B. says,—"The general rule is, that, if an arbitrator makes a mistake, which is not apparent on the face of his award, the party injured has no redress; and there is no difference between a mistake in the law of evidence and in other matters. If no corruption be shown, the court ought not to interfere." And the rule of law is the same, whether the reference is under an order of Nisi Prius or under an ordinary judge's order, or whether it be a reference of the cause and all matters in difference, or a mere assessment of damages.

Edward James, Q. C., and *Quain*, in support of the rule.—It is a mistake to suppose that the rule is limited, as suggested, to cases of misconduct on the part of the arbitrator, or to defects apparent on the face of the *award: the court will always interfere to prevent [*196
injustice, where the arbitrator, intending to act according to law, has decided contrary to law. One of the earliest instances of this is the case of Kent *v.* Elstob, 3 East 13, where Grose, J., said: "The award is clearly wrong, considering it to be founded upon the reasons stated by the arbitrator in the paper delivered with it (which altogether must be taken as one instrument); for, it appears from thence that he proceeded

(*a*) In Sharman *v.* Bell, 5 M. & Selw. 504.

upon a ground which cannot be supported in our law. And he has done wrong, according to his own principles and view of the subject; for, it is evident that he meant to determine according to law, and he has mistaken it; therefore the award is not such as he intended it to be." And Lawrence, J., said: "It is not necessary that the arbitrator's reason for making his award should appear upon the face of it, in order to enable the court to examine them. Here, there is no doubt what the arbitrator's reasons were, he having himself delivered them in writing to the parties, as the grounds of his decision, from whence it clearly appears that he has mistaken the law upon which he meant to proceed." In the present case, it is true, it does not appear upon the face of the award, but it appears from the affidavits, on both sides, that the arbitrator, intending to decide according to law, has decided against it. Delver *v.* Barnes, 1 Taunt. 48, proceeds upon the same principle as Kent *v.* Elstob. [WILLIAMS, J.—Leggo *v.* Young, 16 C. B. 626 (E. C. L. R. vol. 81), is a strong authority against you. There, by an order made under the compulsory power given by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 3, a cause was referred, nothing being said about costs: the umpire, by his award, "adjudged that the defendants should pay to the plaintiff 159*l.* 0*s.* 9*d.* in full of all demands in the above-mentioned action." The award was accompanied by a note
*197] from the *umpire to the plaintiff, on a separate piece of paper, but not annexed to the award, in which the umpire expressed an opinion that the costs of the action, and of the reference and award, should be paid by the defendants, and that he would have so ordered, but that he could not do so, inasmuch as the order of reference was silent as to costs: and this court held that the parties were to be bound by the *award*, and that the accompanying note could not be looked at. [CROWDER, J.—I thought it was an established rule that the courts will not set aside an award on the ground that the arbitrator has by mistake adjudicated wrongly on a matter of law.] Hutchinson *v.* Shepperton, 13 Q. B. 955 (E. C. L. R. vol. 66), shows that that it is not an inflexible rule. Lord Denman, in delivering the judgment of the court, there says:—"Though fully sensible of the propriety of observing the greatest caution with regard to this subject, to avoid inquiries which would unravel by-gone transactions and keep alive the litigation which the parties had hoped to terminate by reference, we cannot think the rule universal and subject to no exception. It is at most one for guiding our discretion, which cannot be so absolutely fettered and rendered powerless." [CROWDER, J.—In that case there was no misapprehension of law. WILLIAMS, J.—The strongest case in your favour is Jones *v.* Corry, 5 N. C. 187 (E. C. L. R. vol. 35), 7 Scott, 106, 7 Dowl. P. C. 299, where an arbitrator, with a view of enabling one of the parties litigant to make an application to the court, after the publication of his award stated matters which showed he had put a mistaken construction upon the rule of reference, and had misdecided accordingly; and the court received affidavits of these facts, and set aside the award, notwithstanding upon the face of it there was no objection.] It clearly is not necessary that the mistake should
*198] be brought to the knowledge of the court by what appears *on the face of the award, or of a paper accompanying it. This is not like the case of a reference of all matters in difference: and, if there be no means of setting right an error of the arbitrator, counsel will be very

unwilling to refer questions of this sort. [COCKBURN, C. J.—All difficulty might be obviated by a stipulation that the arbitrator's decision upon any general principle should not bind the parties.] That could not have been done here; for, it was not known that any claim in respect of the detention of the vessel would be set up, until after the order of reference had been settled. In truth, this was not a matter that was intended to be referred at all. Broadhurst *v.* Darlington, 2 Dowl. P.C. 88, is also an authority to show, that, where an arbitrator to whom a reference is made as to the amount of damages the plaintiff is entitled to, intending to adopt the proper rule, by mistake fails to do so, the court will interpose. At all events, the court may refer the matter back to the arbitrator under the very large powers conferred upon them by the 8th section of the Common Law Procedure Act, 1854, which enacts, that, "in any case where reference shall be made to arbitration as aforesaid, the court or a judge shall have power, at any time, and from time to time, to remit the matters referred, or any or either of them, to the reconsideration and redetermination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said court or judge may seem proper." It is not confined to compulsory references ordered under the powers of the act: In re Morris, 6 Ellis & B. 383 (E. C. L. R. vol. 88). [COCKBURN, C. J.—Is not that a power given to the court, to be exercised in cases where otherwise they must have set aside the award?] It is submitted that the authority is not so limited. [COCKBURN, C. J.—The attention of the other side has not been called to this point by the form of your rule: and it certainly gives rise to a very grave *question. The inclination of my opinion is, that that section was only [*199 intended to apply to cases where the court sees grounds for setting aside the award, but where the mistake might be set right by sending the matter back to the arbitrator. How *can* that apply to a case where the court feels that it has no jurisdiction to set aside the award?] It is entirely in the discretion of the court. [WILLIAMS, J.—The effect of your argument is, that the legislature by this provision for sending back the matter to the arbitrator intended to subvert the whole principles regulating arbitrations, and the authority of the court. It is a monstrous proposition.] In Burnard *v.* Wainwright, 19 Law J., Q. B. 423, after an award made in favour of B. against W. on a submission to reference between them, which contained a clause empowering the court to remit the matters to the reconsideration of the arbitrators, W. moved to send back the award to the arbitrators on the ground that since the award he had discovered a letter in the handwriting of B., which contained material evidence in his favour. The arbitrators deposed, that, had such a letter in the handwriting of B. been produced at the reference, their decision would have been materially affected. B. in answer swore that the letter was not in his handwriting, but was an absolute forgery. Wightman, J., remitted the case to the arbitrators, for them to say whether the letter was in B.'s handwriting, and, if they found that it was, then for them to reconsider the matters in difference. [CROWDER, J.—Was the arbitrator asked to reserve the question for the court under the 5th section of the Common Law Procedure Act, 1854?] He was not.

COCKBURN, C. J.—I am of opinion that this rule should be discharged. Without entering into a consideration of the merits of the case, or inquiring *whether or not the arbitrator was right in allowing [*200 the sum in question as damages in the action, I am of opinion

that we have no jurisdiction. It is not easy to reconcile all the decisions as to how far the court will interfere with the determination of an arbitrator, whether upon the law or upon the facts. But the modern cases which have been cited certainly go the length of deciding, that, unless there be something upon the face of an award to show that the arbitrator has proceeded upon grounds which are not sustainable in point of law, the court will not entertain an objection to it. Flaviell *v.* The Eastern Counties Railway Company, 2 Exch. 344,† is very much to the purpose. There, a writ having issued in an action of debt against an incorporated railway company, the defendants' attorney consented to a judge's order referring to arbitration "the claims of the plaintiff in the action." The plaintiff claimed before the arbitrator a sum for extra work occasioned by the defendants' breach of covenant in not giving the plaintiff possession of certain land at a stipulated time. The arbitrator entertained this claim, though objected to, and awarded the plaintiff a sum in respect of it. The court refused to set aside the award: and, upon a motion to enforce it, under the 1 & 2 Vict. c. 110, s. 18, it was held, that, if the matter in dispute were not within the jurisdiction of the arbitrator, the defendants should have applied to the court to revoke the submission; but, not having done so, and the plaintiff having set up this matter as "a claim in the action," and the arbitrator having so decided in respect of it, his award was binding, *however erroneous*. The court there refused to interfere, upon the general principle, that they will not, as Parke, B., observes in the course of the argument, set aside the decision of one whom the parties have selected to be the judge of the law and the fact. So, here, the parties have selected their own tribunal; *and they
*201] are bound by the decision, be it right or wrong. The only remaining question is, whether or not the court is called upon to interfere by reason of the 8th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. It is true that section gives the court authority, in any case where reference shall be made to arbitration, at any time, and from time to time, "to remit the matters referred, or any or either of them, to the reconsideration and redetermination of the said arbitrator, upon such terms, as to costs and otherwise, as to the said court or judge may seem proper." I am, however, clearly of opinion that it was not intended by that enactment to alter the general law as to the principles upon which the courts had been in the habit of acting in determining whether they would or would not set aside awards; but merely to give the court power to remit the matter to the arbitrator for reconsideration in all cases, though the submission should not contain that extremely useful clause giving them that power, where it turned out that there was a fatal defect in the award, but of such a nature as not to render it expedient to set aside the award, and thus render nugatory all the expense that had been incurred under the reference. I see nothing on the face of this award that would have justified the court in interfering to set it aside, and therefore I think it is not a case in which jurisdiction to send it back to the arbitrator is conferred upon us by s. 8. I therefore think this rule should be discharged.

One word as to the inconvenience which, it has been suggested, might arise from holding parties conclusively bound by the decision of an arbitrator upon a nice and intricate point of law, in cases where a mere question of amount of damages is referred to him. That inconvenience, if it be one, may always be obviated by introducing into the submission

or order of reference *a clause enabling either party to call upon [*202
the arbitrator to reserve any question of law that might arise for
the decision of the court. Besides, there is a provision in this statute (s. 5) enabling the arbitrator, "if he shall think fit, and it is not provided to the contrary, to state his award, as to the whole or any part thereof, in the form of a special case for the opinion of the court." That course might have been taken here; but it does not appear that the arbitrator was called upon by either party to do so. They have, therefore, no ground for complaining that their rights are concluded by the award.

WILLIAMS, J.—I am entirely of the same opinion. The law has for many years been settled, and remains so at this day, that, where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and of fact. Many cases have fully established that position, where awards have been attempted to be set aside on the ground of the admission of an incompetent witness or the rejection of a competent one. The court has invariably met those applications by saying, "You have constituted your own tribunal; you are bound by its decision." The only exceptions to that rule, are, cases where the award is the result of corruption or fraud, and one other, which, though it is to be regretted, is now, I think, firmly established, viz. where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award. Though the propriety of this latter may very well be doubted, I think it may be considered as established. This is simply the case of a reference to an arbitrator before whom has arisen a question of law which he has decided, and, for the purpose of this motion, must be assumed to have *decided ill. I think we [*203
have no right to interfere. But it is said that the law upon this
subject has been varied by the 8th section of the Common Law Procedure Act, 1854, and that we ought under the authority of that section to send the matter back to the arbitrator, with an intimation that he has decided wrong, and a direction to decide otherwise. I think it is impossible to say that this clause has so far varied the law as to alter the power and character of the arbitrator, and to enable us to say that his decision shall no longer be final either as to the law or the facts. This provision of the statute was intended merely to introduce into every order of reference the clause familiarly known as "Mr. Richards's clause." Nobody ever dreamt that the introduction of that clause into the order had the effect of altering the law as to the decision of the arbitrator being conclusive.

CROWDER, J.—I take it that the general rule of law is clear and well ascertained, that the court will not interfere to set aside an award which is good upon the face of it, on the ground that the arbitrator has made a mistake whether of fact or of law. Having selected their own judge, the parties are bound by his decision. That this is the general rule, indeed, is admitted; but it is said that this case forms an exception to that general rule; for that the parties are not to be supposed to have made the arbitrator the judge to decide the particular matter now in question. It seems to me that this is a fallacy. The arbitrator was chosen by both parties to decide upon the amount of damages the plaintiff was entitled to recover. It so happens that a portion of the damages

was not contemplated at the time the order of reference was made, viz. the deduction by the commissioners of the Admiralty of freight for the
*204] period during which the vessel was under repair, *and so unable to perform the service for which she was engaged. That matter was brought before the arbitrator, and he has decided it. I see no reason in this case to depart from the general rule, which seems to me to be a very convenient and proper one. Even in a case where the arbitrator had made a clear mistake as to figures,—In re Hall and Hinds,—the court doubted its power to rectify it. It was insisted, that at all events, we ought to interfere by virtue of the power given to the court by the 8th section of the Common Law Procedure Act, 1854. This was an entirely new suggestion, which was started suddenly upon us in the course of the argument. It struck me at once as being highly improbable that that section should have the effect of altering the general rule of law: and, on further reflection, it seems to me to be quite clear that it was not so intended, and does not so operate. The intention of the 8th section evidently was, to give the court the same power in all cases to send back an award for reconsideration, as they before had only in those cases where the submission or order contained a special provision to that effect. If, as is suggested, the statute altered the law in this respect, the consequence would be that the court would in almost every case be called upon to interfere,—a consequence which would very materially impair the utility of arbitration.

WILLES, J.—I am entirely of the same opinion, and I should have been of that opinion if I had come to the conclusion that that very experienced arbitrator, Mr. Richards, had decided this matter as erroneously as, upon reading the affidavits, I am satisfied that he decided rightly. The parties agreed to take his decision upon the question of damages instead of that of the court and jury; and, if we were now to substitute ours for his, we should be acting contrary to the agreement
*205] *of the parties, and without jurisdiction. It is quite clear, that, before the passing of the last Common Law Procedure Act, the court could not, as a general rule, interfere with the discretion of an arbitrator. An exception had been introduced in the case of a mistake of law apparent on the face of the award. I do not say that my reason assents to that exception. We are bound by the course of the decisions. I regret that we are so. However, this case does not come within the exception. Then it is said, that though irrespectively of the Common Law Procedure Act, the court might have no jurisdiction to set aside the award, yet they have power under s. 8 to send the matter back to the arbitrator for reconsideration. It is obvious that this would open a door to much inconvenience, uncertainty, and fraud,—besides leading to the manifest absurdity, that the court would be exercising a jurisdiction, not upon a special case, as is provided by s. 5, but upon affidavit. It would be absurd to hold, that, where no special case was stated under s. 5, the whole matter is to be thrown at large and be disposed of upon affidavit under s. 8. It seems to me that the 8th section was simply intended to enable the court to send back a case to the arbitrator, in all cases where, otherwise, by reason of the want of a clause for that purpose, they would have been precluded from so doing. With respect to the case of Burnard v. Wainwright, 1 L. M. & P. 455, I neither express assent nor dissent from the doctrine there laid down. The rule must be discharged.

Byles, Serjt., for the plaintiff, asked for costs.

Quain.—The rule is not moved with costs.

WILLES, J.—Where a rule to set aside an award is discharged, it is always discharged with costs. Rule discharged, with costs.

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*CARPENTER *v.* PARKER. *Nov.* 13. [*206

By a deed of settlement made by the defendant in 1842, under a power contained in his father's will, a term of 1000 years in certain estates was limited to Teed and White, in trust, by mortgage, sale, or otherwise, to raise a sum not exceeding 10,000*l.* for payment of the defendant's debts; and in 1843 the trustees assigned the term by way of mortgage to A. and B., the defendant being a party to the deed, covenanting for payment of the principal and interest, and also for title in the trustees, and for quiet enjoyment by the mortgagees in case of default. This assignment contained a power to the defendant to lease, *by and with the consent and approbation of the mortgagees, their heirs*, &c. In 1846, the defendant, without having obtained the consent of the mortgagees, granted a lease of part of the lands to the plaintiff, with a covenant for quiet enjoyment during the term, "without the let, suit, trouble, denial, *eviction, molestation*, or *disturbance* of the lessor, his heirs or assigns, or any person or persons claiming or deriving, or to claim or derive, by, from, or under him, them, or any of them."

The plaintiff in 1851 received a notice from the surviving mortgagee, informing him of the mortgage, and that the principal and interest were unpaid and in arrear, and requiring the plaintiff to pay rent to him. Having consulted his attorney, and finding that he could not successfully resist the claim of the mortgagee, the plaintiff consented to give up possession of the land to him, and the mortgagee entered and took possession,—paying the plaintiff 75*l.* as a compensation for certain improvements.

Upon a case stated for the opinion of the court:—Held, that the plaintiff was entitled to maintain an action upon the covenant for quiet enjoyment,—the facts showing an eviction, or, at all events, a molestation and disturbance of the plaintiff, by one claiming title by, from, or under the defendant.

The breach assigned in the declaration alleged an "eviction" only, and that by one having title "by virtue of a mortgage theretofore to him made *by the defendant*:"—The court amended the declaration, by alleging the eviction to have been by one claiming "by, from, or under the defendant," and adding that the plaintiff was "molested and disturbed" in his enjoyment of the premises.

THIS was an action brought by the plaintiff to recover 1000*l.* damages against the defendant, for an alleged breach of a covenant for quiet enjoyment of a mansion and property at Cherrymount, in the county of Waterford, in Ireland.

The declaration stated, that theretofore, to wit, on the 26th of May, 1846, the defendant by deed let to the plaintiff certain lands at Cherrymount, in the county of Waterford, in Ireland, to have and to hold all and singular the said demised premises, together with their and every of their rights, members, and appurtenances, unto the plaintiff, his heirs, executors, administrators, and assigns, from the 29th of September then last past, for and during the natural lives and life of the plaintiff and his the plaintiff's wife, and the survivor of them, or for and during the full term, time, and space of thirty-one years from the said 29th of September, *whichever of the said terms should longest last: That the defendant did in and by the said deed covenant with [*207 the plaintiff that he the plaintiff should and might peaceably and quietly have, hold, occupy, possess, and enjoy the said demised premises, with their and every of their appendances and appurtenances, during the term thereby granted, without the let, suit, trouble, denial, eviction, *molestation or disturbance* of the defendant or his heirs or assigns, or any

person or persons claiming or deriving or to claim or derive, by, from, or under him, them, or any of them: That by virtue of the said indenture, the plaintiff afterwards, and before this suit, entered into and upon the said demised premises, and became and was possessed thereof for the said term so to him thereof granted as aforesaid: Breach, that, although the plaintiff had always from the time of the making of the said deed thitherto observed, performed, fulfilled, and kept all and singular the covenants and agreements in the said indenture contained on his part to be observed, performed, fulfilled, and kept; yet the plaintiff did not during the said term peaceably and quietly have, hold, occupy, possess, and enjoy the said demised premises and appurtenances according to the said covenant [*but, on the contrary thereof*],(*a*) after the making of the said deed, and during the said term thereby granted, and whilst the plaintiff was possessed of the said demised premises, with their appurtenances, one Hilary Frederick L'Estrange, who before and at the time of the making of the said deed, and continually from thence until and at the time of the eviction and expulsion thereinafter mentioned, had, and who still had, lawful right and title to the said premises, with the appur-
*208] tenances [to wit, by virtue of a mortgage thereof *theretofore to him made by],(*b*) *by, from, and under* the defendant, *and not by or under the plaintiff*, did enter into the said premises, with the appurtenances, *claiming such right and title to the same as aforesaid, and molested and disturbed the plaintiff in his enjoyment thereof*, and ejected, expelled, and removed the plaintiff therefrom, and kept and held out, and still kept and held out, him the plaintiff from his possession and occupation thereof,—by reason of which premises the plaintiff had not only entirely lost and been deprived of the said demised premises, with their appurtenances, but also a large sum of money, to wit, 500*l.* by him paid, laid out, and expended in and about the repairing and permanently improving the said premises, and was compelled to sell off his the plaintiff's stock of and belonging to the said premises, in great haste, and at a considerable sacrifice and loss: And the plaintiff claimed 1000*l.*

The defendant pleaded,—first, non est factum,—secondly, that the plaintiff did during the said term peaceably and quietly have, hold, occupy, possess, and enjoy the said demised premises and appurtenances, according to the said covenant, and that the said premises, with the appurtenances, were not entered into, nor was the plaintiff ejected, *molested, disturbed*, expelled, or removed therefrom, or kept or held out from his possession or occupation thereof, as alleged. Issue thereon.

The cause came on for trial before Jervis, C. J., at the sittings for London after Trinity Term, 1856, when a verdict was taken for the plaintiff, with 1000*l.* damages, and 40*s.* costs, subject to the opinion of the court upon the following case:—

*209] *In the early part of the year 1846, the plaintiff was desirous of taking and renting a certain mansion-house, with buildings, lands, and premises, situate at a place called Cherrymount, in the county of Waterford, in Ireland: and, on the 26th of May, 1846, the defendant by lease granted and demised to the plaintiff all that part of Cherry-

(*a*) These words were struck out on the argument, at the suggestion of Willes, J., and the word "and" substituted.

(*b*) The words within brackets were struck out, and those in italics inserted on the amendment.

mount then lately in the possession of L. Sheridan, and then in the plaintiff's actual possession, amounting to 61*a.* 3*r.* 30*p.*, together with the dwelling-house, offices, and appurtenances, to hold the said demised premises, with their rights, members, and appurtenances, unto the plaintiff and his heirs, from the 29th of September then last past, during the natural lives and life of the said plaintiff and Sarah Carpenter, his wife, and the survivor of them, or for and during the term, time, and space of thirty-one years from the said 29th of September, fully to be complete and ended, whichever of the said terms should longest last, he the plaintiff yielding and paying the annual rent of 92*l.* 18*s.*, and, amongst other covenants in the said lease, was the following,—"And, further, that he the said plaintiff, his heirs, &c., paying the said reserved yearly rent, and performing the covenants and agreements on his and their parts to be paid and performed, shall and may peaceably and quietly have, hold, occupy, possess, and enjoy the said demised premises, with their appendances and appurtenances, during the term thereby granted, without the let, suit, trouble, denial, eviction, molestation, or disturbance of the said defendant, his heirs or assigns, or any person claiming or deriving, or to claim or derive, by, from, and under him or them, or any of them."

The lease was duly executed by the defendant on the day it bears date; and the plaintiff entered into and upon the said demised premises, and took possession thereof, according to the terms of the lease, and continued in possession thereof until the 15th of *September, [*210
1851, when he received and was served with a notice by one Hilary Frederick L'Estrange, in the words and figures following:—

"Whereas, by indenture bearing date the 15th of September, 1843, and made between John Godfrey Teed, of, &c., and Edmund White, of, &c., of the first part, Henry Parker, of, &c., of the second part, and Thomas L'Estrange, of, &c., and Hilary Frederick L'Estrange, of, &c., of the third part, the lands of Conneragh, situate in the barony of Coshbride, in the county of Waterford, and also the lands of Ballyrussell, situate in the barony of Coshmore and Coshbride, and county of Waterford, and the lands of Old and New Conniky and Moneygowin, consisting of arable, meadow, and pasture, and containing in the whole, by estimation, 905*a.* 1*r.* 20*p.* English statute measure, be the same more or less, situate, lying, and being in the barony of Kynatallon, and county of Cork, were conveyed in mortgage to the said Thomas L'Estrange and Hilary Frederick L'Estrange, their executors, administrators, and assigns, for a term of one thousand years, to secure the sum of 10,300*l.* therein mentioned, subject to redemption on payment of the said principal sum, and interest thereon, upon the 15th of September then next following: and it was thereby provided, that, if default should be made in payment of the said sum of 10,300*l.* and interest, or any part thereof, unto the said Thomas L'Estrange and Hilary Frederick L'Estrange, their executors, administrators, and assigns, at the time aforesaid, then it should and might be lawful to and for the said Thomas L'Estrange and Hilary Frederick L'Estrange, their executors, administrators, and assigns, from time to time and at all times thereafter peaceably and quietly to enter into and upon, and to hold, use, occupy, possess, and enjoy the said lands, and every part thereof, and to receive and take the rents, [*211
*issues, and profits thereof to and for his and their own use and

benefit for the residue of the said term of one thousand years: and it was thereby declared by and between the said Thomas L'Estrange and Hilary Frederick L'Estrange that the said sum of 10,300*l.* was money belonging to them upon a joint contract, and that, in the event of the decease of either of them, the receipt or receipts of the survivor of them should be a good and sufficient discharge or discharges: And whereas the said Thomas L'Estrange is since dead: And whereas the said principal sum of 10,300*l.* was not, nor was any part thereof, paid at the time appointed for payment thereof, but the whole of the same, and a large arrear of interest thereon, still remains due: Now, take notice that I the said H. F. L'Estrange hereby caution the several tenants of the said lands from paying any of the said rents to the said Henry Parker, or any one on his behalf, or to any one save unto me the said H. F. L'Estrange, or to an agent lawfully appointed by me: And I hereby further require the said tenants not to allow the said Henry Parker, or any other person, without permission in writing from me, to cut any of the timber or other trees on the lands, or any part thereof. Dated this 15th day of September, 1851. (Signed) HILARY FREDERICK L'ESTRANGE.

"To the several tenants on the lands aforesaid."

The plaintiff, until he received the notice of the 15th of September, 1851, hereinbefore set forth, had no notice or knowledge of the said mortgage, and was not aware of the existence thereof.

The plaintiff's term granted by the said lease had not expired when the said H. F. L'Estrange *so took possession*;(*a*) but the lease was still in force and effect.

In September, 1851, the plaintiff, who up to that time had occupied the premises and spent a considerable sum of money upon them, being advised by his attorney (after *investigating the title) that he
*212] could not dispute Mr. L'Estrange's title, and under that impression quitted the property, and did not prevent Mr. L'Estrange from entering. Mr. L'Estrange thereupon did enter and take, and has since kept possession without opposition, he paying the plaintiff at the time of his taking possession the sum of 75*l.*, and the plaintiff receiving it without prejudice to his right, if any, against the now defendant.

Proceedings were taken in the Encumbered Estates Court in Ireland, by a judgment creditor, relative to the said premises so demised by the defendant to the plaintiff; and, the said property being in that court for administration pursuant to the statutes, the following order was made at the instance of the plaintiff:—

"Encumbered Estates Court.

"Estate of Henry Parker . . . Owner.

"Roger Greene Davis and others . Petitioners.

"It is hereby consented and agreed by Thomas Carpenter, Esq., and Hilary Frederick L'Estrange, that, in consideration of the sum of 75*l.* in hand this day paid to him the said Thomas Carpenter by the said H. F. L'Estrange, the said Thomas Carpenter abandons all claim as against the said H. F. L'Estrange, or the funds to be realized by sale of the estates in this matter, for compensation or otherwise under the order of Mr. Commissioner Hargreave, bearing date the 4th of June, 1852, and under the covenant in the lease of the lands of Cherrymount bearing

(*a*) Sic.

date the 26th of May, 1846, and for the costs of the said Thomas Carpenter of the objections filed by him and of the motion made the said 4th of June, 1852: And it is further consented and agreed that the said H. F. L'Estrange be at liberty to take immediate possession of the said house and lands of Cherrymount, and all fixtures and crops thereon; and that the said Thomas Carpenter do give up all *claim thereto, or any compensation in respect thereof, against the funds in [*213 this matter: this agreement or consent, however, to be without prejudice to any proceedings which the said Thomas Carpenter may think fit to take, under the said covenant in the said lease, or otherwise, against Mr. Henry Parker or Mr. M. Greene, or either of them, personally, or against any fund which may become payable or be allocated to them, or either of them, out of the funds in this matter, for compensation, costs, or otherwise. Dated this 12th of June, 1852.

(Signed) "R. G. DURDIN, solicitor for the said
THOMAS CARPENTER.
"THOMAS GRIER, solicitor for the said
H. F. L'ESTRANGE."

The said mortgage mentioned in the said notice was made under the power recited therein: and in the same mortgage the following power of leasing was contained:—

"Provided always, and it is hereby declared and agreed by and between the said several persons parties hereto, that it shall and may be lawful for the said Henry Parker, John Robert Theophilus Hastings Parker, Henry Francis Hastings Parker, George Ferdinand Hastings Parker, and Philip Reginald Hastings Parker, and for such other son of the said Henry Parker begotten during the lifetime of the said testator, and to be born as aforesaid (if any such there shall be), severally and respectively, at any time or times during their respective lives, when and as they shall respectively, by virtue of any of the limitations hereinbefore contained, be in the actual possession and receipt of the rents, issues, and profits of the said several towns, villages, lands, hereditaments, and premises hereinbefore mentioned and intended to be hereby released, and to and for the guardian or guardians of any and each minor who by virtue of the limitations hereinbefore *contained [*214 shall for the time being be entitled to the actual possession and receipt of the rents, issues, and profits of the same several towns, villages, lands, hereditaments, and premises, either as tenant for life or tenant in tail male, during his respective minority, by any deed or deeds sealed and delivered in the presence of two or more credible witnesses, to demise or let all or any part or parts of the said several towns, villages, lands, hereditaments, and premises, to any person or persons for any term or number of years not exceeding twenty-one years in possession; and also to demise or lease all or any part or parts of the said several towns, villages, lands, hereditaments, and premises, for one life or for two or three lives in being at the same time, or for any term or number of years determinable on the dropping of one life or two or three lives in being at the same time, either in possession or reversion, but so as to wear out or be determinable on the dropping of the lives of three persons all in being at one and the same time, or for one life or two or three lives in being at one and the same time, with a further

term of thirty-one years to take effect after the expiration of the last subsisting life; and also to demise or lease all or any part or parts of the said hereditaments and premises mentioned to be hereby released, to any person or persons who shall be willing and shall accordingly by such demise or lease covenant and agree to improve the same by erecting or building thereon any new house or houses, erections or buildings, or to rebuild or repair any of the messuages, tenements, or buildings which now are or hereafter shall be on the premises, and to expend such sums of money in such improvements as shall be an adequate consideration for the interest to be departed with in such parts of the said hereditaments so to be demised respectively, for one life or for two or three lives
*215] as aforesaid, or for any number of years *determinable on the dropping of one life or two or three such lives as aforesaid, so as upon every such demise or lease as aforesaid there be reserved and made payable during the continuance thereof, to be incident to and go along with the reversion expectant thereon respectively, the best and most improved yearly rent or rents that can be reasonably had or obtained for the same, without taking any sum of money or other thing by way of fine, premium, or foregift for or in respect of any such demise or lease, and so as such lessees respectively, and their respective executors, administrators, or assigns, be not made dispunishable of waste by any expression therein, and so as in every such lease there be contained a clause of re-entry for non-payment of the rent or rents thereby respectively reserved, by the space of twenty-one days after the same, or any part thereof, shall become due, and so as the respective lessees to whom such leases shall be made do seal and deliver counterparts thereof respectively."

It is agreed between the parties that a copy of the lease hereinbefore referred to, and the pleadings on both sides in this action, shall accompany the special case, and be referred to by either of the parties on the argument, and shall form part of the special case.

It is also agreed between the parties, that, should the judgment be in the plaintiff's favour, the question of amount of damages is to be referred to Mr. Serjt. Borwick, the assistant barrister for the Eastern Division of the county of Cork.

The question for the opinion of the court was, whether the plaintiff was entitled to recover from and against the defendant: and, if the court should be of opinion that he was entitled to recover, then the verdict was to be entered for the plaintiff as aforesaid; but, if the court should be of a contrary opinion, then a verdict was to be entered for the defendant.

*216] *The case being set down for argument, *Brewer*, for the plaintiff, in Trinity Term last, obtained a rule to show cause why it should not be amended, by setting out therein the leasing powers contained in the mortgage deed of the 15th of September, 1843, by inserting the words "by and with the consent and approbation of the said Thomas L'Estrange and Hilary Frederick L'Estrange, their heirs, executors, administrators, or assigns, during the continuance of the security of these presents, such consent and approbation being under hand and seal."

This amendment was opposed by *Stammers*, for the defendant; and

ultimately the court ordered that "the mortgage deed of the 15th of September, 1843, be made a part of the said case."

The deed bore date the 15th of September, 1843, and was made between John Godfrey Teed and Edmund White of the first part, Henry Parker (the defendant) of the second part, and Thomas L'Estrange and Hilary Frederick L'Estrange of the third part. It recited the marriage-settlement of John Robert Parker (the defendant's father), of the 15th of July, 1779, whereby John Robert Parker conveyed certain estates (including the Cherrymount estate), part of which were respectively held under three leases for lives renewable for ever, and other part for three lives determinable, under a lease of the 26th of March, 1744, to Richard Parker and Robert Fitzgerald, upon certain trusts,—that Catherine, the wife of John Robert Parker, died, in the lifetime of her husband, on the 31st of December, 1832,—that there were eight children of the marriage, viz., three sons and five daughters,—that John Parker, the eldest son, died in 1834, a bachelor, and that thereupon Henry Parker (the defendant), the second son, became entitled to the settled estates as a quasi tenant *in tail male thereof expectant upon the decease of his father John Robert Parker, subject to a term and a charge [*217 of 2000*l.* for the younger children,—that, in the years 1801 and 1813 respectively John Robert Parker purchased the chief-rents and the fee-simple of the lands comprised in the settlement and held under the leases for lives renewable for ever, and so became the absolute owner thereof,—and that the lease of the 26th of March, 1744, had expired. It then recited a settlement made on the marriage of Henry Parker (the defendant) with Lady Frances Theophila Ann Hastings, of the 10th of March, 1822, under which he covenanted with certain trustees to charge any lands he might become possessed of in Great Britain or Ireland with 200*l.* a year for the benefit of his then intended wife. It then recited the will of John Robert Parker, dated the 17th of May, 1842, whereby he devised his Irish estates, including Cherrymount (subject to the rights of renewal of the trustees of his marriage-settlement, and of the several other persons for the time being claiming under the same settlement, unless his son Henry Parker should consent to settle such lands as thereinafter mentioned, in which case such rights of renewal would cease), to John Godfrey Teed and Edmund White, upon trust, in case his said son Henry Parker should, within twelve calendar months after his (the testator's) decease, consent to and should accordingly with all convenient speed afterwards, at the request of his trustees, or the survivor of them, proceed to settle all the several lands and hereditaments comprised in his (the testator's) said marriage-settlement, and to which his said son would upon his decease become entitled, or which he would then have the full power of disposing of, and also the lands called Summerfield belonging to his said son, for such estate and interest as he originally had therein, to the uses and in *manner therein and [*218 in part hereinafter mentioned, then and in such case that Teed and White, or the survivor of them, or the heirs of such survivor, should join with his said son Henry Parker in settling and assuring, as well the said several lands and estates thereinbefore devised to them as the said several lands and hereditaments comprised in his said marriage-settlement,—which in such case would be discharged from all future right of renewal of the leases,—and also the said lands called Summer-

field (discharged, as to the said lands and estates comprised in his, the testator's, marriage-settlement, from the 2000*l.* provided for his younger children, which in such case was to be raised and paid out of the fund thereinafter set apart for that purpose), to the uses, upon the trusts, and in manner therein and in part hereinafter mentioned, that is to say, as to so many and such part or portion or parts or portions of the said several estates thereby devised and so settled, and the lands called Summerfield, as his said trustees and son Henry Parker, or the survivors or survivor of them, should think proper and sufficient, and should select for that purpose, to the use of his said trustees or trustee for the time being, and their or his heirs and assigns, upon trust by sale or mortgage, or by mortgage and sale afterwards of the same estates, or otherwise, to raise such sum or sums of money as would be sufficient to pay and satisfy and discharge all the debts of his said son Henry Parker, which at the time of his (the testator's) decease might be charged or secured upon the lands and hereditaments comprised in his said marriage-settlement or his said lands at Summerfield, and also all such other debts due and owing from his said son Henry Parker at the time of his (the testator's) decease as he should wish so to charge, and should by *219] writing under his hand direct to be provided for accordingly, *so that the amount of all such several debts of his said son Henry Parker so charged and to be provided for should not together exceed the sum of 10,000*l.*; and, as to so much and such parts of the lands and hereditaments so to be conveyed unto and to the use of his said trustees or trustee for the time being, and their or his heirs or assigns as aforesaid, as might remain after payment of the said several debts thereinbefore mentioned, and to which the same were thereinbefore made liable, and in the mean time subject to the trusts and powers thereinbefore expressed or directed to be limited concerning the same, and also as to all and singular other the said several lands and estates in Ireland lastly thereinbefore devised, and comprised in his (the testator's) said marriage-settlement, and the said lands called Summerfield, and which should not be conveyed unto and to the use of his said trustees or trustee for the time being upon such trusts as aforesaid, to the uses and in manner therein and in part hereinafter mentioned, that is to say, to the use of his (the testator's) said son Henry Parker and his assigns, for life, with successive remainders in tail male to the testator's grandsons, John Robert Theophilus Hastings Parker and Henry Francis Hastings Parker, sons of Henry Parker, with divers remainders over,—with power to the trustees and the testator's son Henry Parker, in the settlement so to be made as therein and hereinbefore mentioned, to charge and provide for the payment of the annuity of 200*l.* according to the covenant of his said son Henry Parker in the deed of the 10th of March, 1822. The deed then went on to recite the death of John Robert Parker on the 26th of May, 1842, and proof of his will; that, by indentures of lease and release and settlement of the 26th and 27th of June, 1842, the release and *220] settlement being made between Henry *Parker and his wife of the first part, Teed and White of the second part, Alexander Shearer of the third part, and Charles Hertslet of the fourth part, a term of 1000 years in the estates comprised in the settlement of the 15th of July, 1779, was limited to the use of White and Teed, in trust by mortgage or sale, &c., to raise a sum not exceeding 10,000*l.* for the purpose of paying the

debts of Henry Parker; that Teed and White, as such trustees as aforesaid, were desirous of raising 10,000*l.* for that purpose, and had applied to Thomas L'Estrange and Hilary Frederick L'Estrange to lend them that sum, and also 300*l.* for the expenses of raising the same, and had agreed to secure the repayment thereof, with interest, by an assignment of the lands and hereditaments comprised in the said term of 1000 years, by way of mortgage; and that Henry Parker "for the satisfaction only of the said Thomas L'Estrange and Hilary Frederick L'Estrange, and not by way of exonerating the said several lands and hereditaments thereby assigned and mortgaged from the payment of the said sum of 10,000*l.*, or the interest thereof, or the said sum of 300*l.*, or any part thereof respectively, had agreed to enter into the covenant for payment, and also the covenants for title of the same several lands and hereditaments on his part thereinafter contained." The deed then witnessed that Teed and White assigned to the said Thomas L'Estrange and Hilary Frederick L'Estrange the lands and hereditaments comprised in the term created by the indenture of the 27th of June, 1842, for the said term of 1000 years, subject to redemption on repayment of the principal and interest at certain times: and Henry Parker covenanted to pay the principal and interest on the days named, that Teed and White had good title to assign, and that, in case of default, "it should be lawful for the mortgagees to enter and take the rents, *&c., to and for his and their own use and benefit for and during all the rest, residue, and remainder which [*221 should be then to come and unexpired of the said term of 1000 years thereby assigned therein, without the let, suit, hindrance, interruption, denial, or demand whatsoever of or by Teed and White, or either of them, or their or either of their executors or administrators, or any of them, or any other person or persons whomsoever; and that free and clear or freely and clearly acquitted, exonerated, and discharged, or otherwise by the said Henry Parker, his heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified of, from, and against all former and other gifts, grants, bargains, sales, mortgages, assignments, rents and arrears of rents, statutes, judgments, recognisances, titles, charges, and encumbrances whatsoever;" and, also for further assurance. The deed then contained the following power of leasing:—"Provided always, and it is hereby agreed and declared by and between the said several persons parties hereto, that it shall and may be lawful for the said Henry Parker, and for his sons John Robert Theophilus Hastings Parker, Henry Francis Hastings Parker, George Ferdinand Hastings Parker, and Philip Reginald Hastings Parker, when and as they shall respectively, by virtue of any of the limitations contained in the said recited deed of the 27th of June, 1842, be in the actual possession and receipt of the rents, issues, and profits of the said several lands, &c., hereinbefore mentioned, and intended to be hereby released, and to and for the guardian or guardians of any and each minor who by virtue of the limitations hereinbefore contained shall for the time being be entitled to the actual possession and receipt of the rents, issues, and profits of the same several lands, &c., as tenant for life, or tenant in tail male, during his respective minority, *by and with the *consent and approbation of the said Thomas L'Estrange, and Hilary* [*222 *Frederick L'Estrange, their heirs, executors, administrators, or assigns, during the continuance of the security of these presents, such consent and*

approbation being under hand and seal, by any deed or deeds sealed and delivered in the presence of two or more credible witnesses, to demise or let all or any part or parts of the said several lands, &c., to any person or persons, for any term or number of years, not exceeding twenty-one years, in possession, and also to demise or lease all or any part or parts of the said several lands, &c., for one life, or for two or three lives in being at the same time, or for any term or number of years determinable upon the dropping of one life, or two or three lives in being at the same time, either in possession or reversion, but so as to wear out or be determinable on the dropping of the lives of three persons all in being at one and the same time, or for one life, or for two or three lives in being at one and the same time, with a further term of thirty-one years, to take effect after the expiration of the last or subsisting life, and also to demise or lease all or any part or parts of the said several hereditaments and premises mentioned to be hereby released, to any person or persons who shall be willing and shall accordingly by such demise or lease covenant and agree to improve the same by erecting or building thereon any new house or houses, erections, or buildings, or to rebuild or repair any of the messuages, tenements, or buildings which now are or hereafter shall be on the premises, and to expend such sums of money in such improvements as shall be an adequate consideration for the interest to be departed with in such parts of the said hereditament so to be demised respectively for one life or for two or three lives as aforesaid, or for any number of years determinable upon the dropping of one life or two or three
*223] *such lives as aforesaid, so as upon every of such demise or lease as aforesaid there be reserved and made payable during the continuance thereof, to be incident to and go along with the reversion expectant thereon respectively, the best and most improved yearly rent or rents that can be reasonably had or obtained for the same, without taking any sum of money or other thing by way of fine, premium, or foregift for or in respect of any such demise or lease, and so as such lessees respectively, and their respective executors, administrators, or assigns, be not made dispunishable of waste by any expression therein, and so as in every such lease there be contained a clause of re-entry for non-payment of the rent or rents thereby respectively reserved, by the space of twenty-one days after the same, or any part thereof, shall become due, and so as the respective lessees to whom such leases shall be made do seal and deliver counterparts thereof respectively." And it was thereby agreed and declared by and between the said several persons parties thereto, and more particularly by the said Thomas L'Estrange and Hilary Frederick L'Estrange, that, until default should happen to be made in payment of the said sum of 10,300*l.* and interest thereby secured as aforesaid, or some part thereof, contrary to the true intent and meaning of those presents, it should and might be lawful to and for the said Henry Parker and his assigns, or other the person or persons for the time being entitled as aforesaid, to have, hold, use, occupy, possess, and enjoy the said lands, &c., thereby assigned, or intended so to be, with their and every of their appurtenances, and to have, receive, and take the rents, issues, and profits thereof to his and their own proper use, without the let, suit, trouble, molestation, interruption, eviction, claim, or demand whatsoever of or by the said Thomas L'Estrange and Hilary

Frederick L'Estrange, *their executors, administrators, or assigns, or any other person or persons whomsoever, claiming or [*224 to claim by, from, or under him, them, or any of them: And it was thereby declared and agreed by and between the said Thomas L'Estrange and Hilary Frederick L'Estrange, that the said sum of 10,300*l.* thereinbefore mentioned to have been advanced by them, and the payment whereof was thereby secured, was money belonging to them upon a joint account, and that, in the event of the decease of either one of them, the receipt or receipts of the survivor of them, or of the executors or administrators of such survivor, or of his or their assigns, should be a good and sufficient discharge or good and sufficient discharges for so much of the said sum of 10,300*l.* and interest thereby secured, as should be therein expressed to be received.

Byles, Serjt. (with whom was *Brewer*), for the plaintiff.(*a*)—By the indenture of the 15th of September, 1843, to which the defendant was a party, certain lands in the county of Waterford, including an estate called Cherrymount, were demised by the trustees of the *defendant's marriage-settlement for a term of 1000 years, to [*225 Thomas L'Estrange and Hilary Frederick L'Estrange to secure a sum of 10,000*l.* which was raised for the payment of the defendant's debts. This deed reserved to the defendant a power to lease any part of the premises, for a term or for lives "by and with the consent and approbation of the mortgagees, their heirs, &c., during the continuance of the security of those presents, such consent and approbation being under hand and seal." On the 26th of May, 1846, the defendant granted a lease of part of the premises comprised in the mortgage to the plaintiff and his wife, for their respective lives or for thirty-one years, whichever of the said terms should longest last; and, by virtue of that lease, the plaintiff entered into possession of the premises, and expended considerable sums of money upon them. This lease was made without the required consent. In September, 1851, the plaintiff received a notice from Hilary Frederick L'Estrange, the surviving mortgagee, that the mortgage-money was unpaid, and the interest largely in arrear, and that the rent must be paid to him. Upon receiving this notice, the plaintiff inquired into the title of Mr. L'Estrange, and, finding it to be indisputable, permitted him to take possession of the premises. Now, the lease not having been granted in pursuance of the power, was defeasible: but that lease contained a covenant that the lessee, his heirs, &c., paying the rent and performing the covenants, should "peaceably and quietly have, hold, occupy, possess, and enjoy the said demised premises, &c., during the term thereby granted, without the let, suit, trouble, denial, *eviction*, *molestation*, or *disturbance* of the lessor, his heirs or assigns, or

(*a*) The following were the points marked for argument on the part of the plaintiff:—

"1. That he was evicted of the demised premises by title paramount, and therefore he is entitled to recover in this action:

"2. That there was a breach of the covenant for quiet enjoyment, by H. F. L'Estrange taking possession:

"3. That there was an eviction from the demised premises:

"4. That the plaintiff had no title or power to prevent or hinder Hilary Frederick L'Estrange taking possession, as the said Hilary Frederick L'Estrange had a superior title to the demised premises than either the defendant or the plaintiff:

"5. That the defendant had no power to grant the lease to the plaintiff as against the title of the said Hilary Frederick L'Estrange."

any person or persons claiming or deriving, or to claim or derive, by, from, or under him, them, or any of them." The question is, whether
*226] the special case discloses a breach of that covenant. In *Woodfall's Landlord and Tenant, 7th edit., p. 513, it is said: "A breach of the covenant for quiet enjoyment may occur either by a molestation arising from a suit at law or in equity relating to the title or possession, or by any act by which the lessee is disturbed in the possession of the premises. Of the first sort is a recovery by ejectment by a person having a lawful title; or any other suit by which the peaceable occupation of the premises is prevented. Thus, a covenant in a lease, that the lessee should quietly enjoy the estate discharged from tithes, is broken by a suit for them, after the expiration of the term: Lanning *v.* Lovering, Cro. Eliz. 916: but where in covenant for quiet enjoyment the breach assigned was 'that the defendant had exhibited a bill in Chancery against him for ploughing meadow, and obtained an injunction, which had been dissolved with 20*s.* costs,'—it was held, on demurrer, to be no breach of covenant, for, the covenant was for quiet enjoyment, and this was a suit for waste,—Morgan *v.* Hunt, 2 Ventr. 213. On the other hand, any description of annoyance to the occupation of the premises, which prevents the lessee from enjoying his property in so ample a manner as he is entitled to do by the terms of the lease, amounts to a breach of the covenant for quiet enjoyment of the second sort; thus, if a man covenant that he will not interrupt the covenantee in the enjoyment of a close, the erection of a gate which intercepts it is a breach of the covenant, although he had a right to erect it: Andrews *v.* Paradise, 8 Mod. 318." In order to constitute a breach of the covenant for quiet enjoyment, it is not necessary that there should be an actual eviction: it is enough if the lessee was molested or disturbed in his enjoyment of the demised premises. Here is a notice of a claim given to the lessee by one who is entitled to give it, and has power to enforce it. In what
*227] position does it *place him? [COCKBURN, C. J.—Suppose the lease had been made with the consent of the mortgagees,—the principal and interest due upon the mortgage being unpaid, would not the surviving mortgagee equally have given such a notice? and, suppose he had, would there have then been a breach of the covenant for quiet enjoyment?] It is submitted that there would. [CROWDER, J.—The notice contains no intimation that advantage will be taken of the irregularity in the lease: all it amounts to is,—"I am mortgagee; pay your rent to me." Is that an eviction?] It is not necessary that there should be an *actual* eviction. The lessee has a right to the enjoyment of the premises subject to the terms of the contract; one of which is, payment of rent to the lessor. By the notice, he finds himself placed between two contending parties: he is not excused from paying rent to his lessor; and, if he paid his lessor after receiving such a notice, he would be liable to be called upon to pay over again to the mortgagee. The service of that notice, therefore, clearly is a "let, trouble, molestation, or disturbance" by one claiming title. Suppose he had resisted the claim of the mortgagee, and, being sued in ejectment, had let judgment go by default,—could it have been said that the covenant for quiet enjoyment had not been broken, because he offered no defence to a defenceless action? [COCKBURN, C. J.—My Brother Williams suggests that the strength of your argument is, that the lessee would have no

answer to a demand for rent by his lessor. WILLIAMS, J.—But a payment of rent to the mortgagee would have been good: Johnson *v.* Jones, 9 Ad. & E. 809 (E. C. L. R. vol. 36), 1 P. & D. 651.] Precisely so. The plaintiff was in the position of a mere tenant at will to the mortgagee. The effect of the notice is,—"If you do not pay your rent to me, I will turn you out." It amounts to a demand of possession. The case of Ludwell *v.* Newman, 6 T. R. 458, goes far beyond what is necessary here. There, in an *action for the breach of a covenant for quiet enjoyment, the declaration stated, that, before the demise [*228 to the plaintiff, the defendant had made a demise to A. which was then subsisting; that, in order to get into possession, the plaintiff brought an ejectment, but was nonsuited on account of that prior demise; and that he never had been in possession. And the court said "that the defendant's covenant for quiet enjoyment meant a legal entry and enjoyment without the permission of any other person, which could not have taken place here on account of the prior lease granted to Rogers, and which was averred to be then subsisting." Here, the lessee could not have continued to hold without the permission of the mortgagee.

Stammers, for the defendant.(*a*)—There has been no breach of the covenant for quiet enjoyment, and no eviction by any person claiming by, from, or under the *defendant. The terms of the covenant [*229 are, that "Carpenter, his heirs, &c., paying the said reserved yearly rent, and performing the covenants and agreements on his and their parts to be paid and performed, shall and may peaceably and quietly have, hold, occupy, possess, and enjoy the said demised premises, with their and every of their appendances and appurtenances, during the term thereby granted, without the let, suit, trouble, denial, eviction, molestation, or disturbance of the said Henry Parker, his heirs or assigns, or any person or persons claiming or deriving, or to claim or derive, by, from, or under him, them, or any of them." And the breach alleged in the declaration is, that "the plaintiff did not during the said term peaceably and quietly have, hold, occupy, possess, and enjoy the demised premises and appurtenances, according to the said covenant; but, on the contrary thereof, after the making of the said deed, and during the term thereby granted, and whilst the plaintiff was possessed of the demised premises, with their appurtenances, one H. F. L'Estrange, who before and at the time of the making of the said deed, and continually from thence until and at the time of the eviction and expulsion therein-

(*a*) The points marked for argument on the part of the defendant were as follows:—

"1. That there was no such let, suit, trouble, denial, eviction, molestation, or disturbance as to amount to a breach of the covenant for quiet enjoyment contained in the lease:

"2. That there was no such let, suit, trouble, denial, eviction, molestation, or disturbance by the defendant, or by any person or persons claiming or deriving by, from, or under the defendant:

"3. That the mortgage being in execution of a power, the mortgagees were in under the donor of the power, and not under the defendant:

"4. That the execution of the power to mortgage did not in any way prevent or interfere with the power to lease:

"5. That, notwithstanding the prior execution of the mortgaging power, the subsequent execution of the leasing power was good:

"6. That leases created under power over-reach all the existing limitations to the extent of the interest comprised in such leases; and that, consequently, the lease in question would take priority of and over-reach the mortgage term; and that such lease was valid, notwithstanding the existence of the previous mortgage."

after mentioned, had, and who still hath, lawful right and title to the said premises, with the appurtenances, to wit, by *virtue of a mortgage thereof theretofore made to him by the defendant*, did enter into the said premises, with the appurtenances, and ejected, expelled, and removed the plaintiff therefrom, and kept and held out, and still keeps and holds out, him the plaintiff from his possession and occupation thereof," &c. That is matter of substance, and the plaintiff cannot vary from it when he comes to prove it: Harris *v.* Mantle, 3 T. R. 307; Hawkes *v.* Orton, 5 Ad. & E. 367 (E. C. L. R. vol. 31), 6 N. & M. 842; per Lord Ellenborough in Seddon *v.* Senate, 13 East 72; 2 Wms. Saund. 178 *a*, n.

*230] As the plaintiff has thought *fit to rely upon an eviction and expulsion, he cannot now depart from that. The facts stated upon this special case clearly do not amount to an eviction. All that appears, is, that the plaintiff, being in under a lease from the defendant, received a notice from the mortgagee of the premises that he would be required to pay rent to him, and, being advised by his attorney that the mortgagee had a title which he could not resist, voluntarily quitted and allowed the mortgagee to take possession of the premises,—receiving from him a sum of money as the price of his abandonment of them. In Comyn's Digest, *Seisin* (F. 2.), it is said: "An act which does not oust him who has the freehold, though it be tortious, will not be a disseisin; as, if a commoner commands the owner of the soil not to cut down trees, whereupon he desists, and goes off out of the land, it is no disseisin; for, he who has right shall not be ousted of his seisin by parol: 1 Roll. 658, l. 10. So, if A enters upon the possession of B, but does not expel him, it is no disseisin: Smartle *v.* Williams, 1 Salk. 244; Co. Litt. 181 a. So, it will not be a disseisin, where a man enters by sufferance of the owner: 1 Roll. 659, l. 20; Skipwith *v.* Conies, 1 Anderson 134." There was no demand of possession here by the mortgagee; no threat of expulsion; nothing but a mere demand of rent. [WILLIAMS, J.—Was the tenant bound to wait until he was turned out by an action of ejectment?] To constitute an eviction, there clearly must be something more than appears here. Then, there was no eviction by the defendant or by a person claiming title by, from, or under him. There was no mortgage by the defendant to L'Estrange; the mortgage was under the power in the marriage settlement of the 15th of July, 1799. The term was created by the trustees, Teed and White, in pursuance of the power given to them under the settlement; and they assigned the term

*231] to the two *L'Estranges, by way of mortgage. The defendant, it is true, is a party to that deed; but it is merely for the purpose of covenanting for payment of the mortgage-money and interest, and for title and further assurance. [COCKBURN, C. J.—The defendant had no power to mortgage.] None: the power was in Teed and White, and they alone exercise it. Hilary Frederick L'Estrange, the surviving mortgagee, therefore, did not enter claiming under the defendant: he claimed under the defendant's father, the creator of the power. In 2 Chance on Powers, p. 2, § 1387, it is said: "The appointee claims through or under the creator of the power: he is *in*, as it is technically termed, under the instrument by which the power is created: the limitation of the estate or interest appointed, is, for many purposes, deemed to be a limitation of the original instrument." If, therefore, L'Estrange had any lawful claim, he has it under John Robert Parker,

the settlor, and not under the defendant. Further, it is submitted that the lease is a valid lease, assuming that the leasing power is contained in the settlement. Notwithstanding the mortgage, the lease afterwards may take precedence. In 2 Chance on Powers, p. 10, § 1410, it is said that "leases created under powers commonly overreach all the existing limitations to the extent of the interests comprised in the leases, whether in possession, in reversion, or in futuro;" and the reason for this is given by Lord Eldon, in Maundrell *v.* Maundrell, 10 Ves. 246,—"When the tenant for life executes the power (to lease), the effect is not technically making a lease; but that the lessee in fact stands precisely in the same relation to all the persons named in the first settlement, as if that settlement had contained a limitation to his use for twenty-one years antecedent to the life estate and the subsequent limitations." It is clear, therefore, that the lease is not invalidated by the term of 1000 years. But it is *said that this lease was not a good exercise of the power, because it is not made with the consent of the mortgagees. [*232 The special case, however, nowhere states that it was made without such consent. [COCKBURN, C. J.—Is not the absence of a recital in the lease that it was with consent, primâ facie evidence that it was without consent?] Clearly not. The assent need not appear on the face of the lease: it may be given "by any deed or deeds sealed and delivered in the presence of two or more credible witnesses." [COCKBURN, C. J.—It is a fact within the defendant's knowledge: he should not have leased without consent.] At all events, the absence of assent is condoned by the acceptance of rent. By a recent statute, 12 & 13 Vict. c. 26, § 3, it is enacted that "the acceptance of rent under an invalid lease, shall, as against the person so accepting the same, be deemed a confirmation of such lease." [WILLES, J.—That is repealed by the 1st section of a still more recent statute,—13 & 14 Vict. c. 17: and the 2d section enacts, "that, when, upon, or before the acceptance of rent under any such invalid lease as is in the said first recited act mentioned, any receipt, memorandum, or note in writing confirming such lease, is signed by the person accepting such rent, or some other person by him thereunto lawfully authorized, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease." Besides, there is no statement in the case that any rent had been paid to the surviving mortgagee.]

Byles, Serjt., in reply.—It was not necessary that there should be an actual eviction: it was enough that Mr. L'Estrange, having a right to enter by virtue of the mortgage, made a claim which the tenant, finding it to be irresistible, declined to contest. [COCKBURN, C. J.—The mortgagee gives the tenant notice to pay *him the rent: the latter finds, that, if he pays him the rent, he may put himself in a false [*233 position with his landlord; and, on the other hand, that, if he refuses, the mortgagee *may* bring ejectment. Under these circumstances, he voluntarily goes out. Is that, within the terms of the breach, "an eviction, expulsion, and removal" of the plaintiff from the premises?] It can hardly be said to be a voluntary going out. The effect of the notice, and of what was done in consequence of it, clearly was an entry by Mr. L'Estrange by virtue of the mortgage. [WILLIAMS, J.—There certainly is considerable difficulty in the declaration as the breach is framed: in substance, it amounts to an averment that the entry was by

one having title to the premises by virtue of a mortgage thereof made to him by the defendant. The facts do not sustain that.] If it be necessary, the breach may be amended, either under the 15 & 16 Vict. c. 76, s. 222, or the 17 & 18 Vict. c. 125, s. 96. The real question in controversy is, whether or not the covenant has been broken. [WILLES, J.—Both sides should amend. The court may mould the proceedings as they see just. COCKBURN, C. J.—What do you say as to the precedence of the leasing power?] It is under the will of John Robert Parker, and not under the settlement of 1779, that the trustees, Teed and White, mortgage. There is no power to lease in the settlement. [*Stammers.*—It is not recited in the mortgage deed; but it *is* in the settlement.] The court can only deal with what is before it. Can it be said that one who claims under a deed to which the defendant is a party, and which is made for his benefit, does not claim by, from, or under him? Whether the mortgage was by the defendant himself, or made through the intervention of trustees, makes no difference.

Cur. adv. vult.

*234] *COCKBURN, C. J.—I am of opinion that the plaintiff in this case is entitled to judgment. The facts are simple. Parker, the defendant, having been a party to the creation of a term of 1000 years which was to be used by the trustees for the purpose of raising a sum of money to pay his debts, the trustees, in September, 1843, assigned that term by way of mortgage to Thomas L'Estrange and Hilary Frederick L'Estrange, to secure a sum of 10,300*l.* and interest. Subsequently to the execution of that mortgage assignment, viz., in May, 1846, the defendant granted a lease of part of the lands therein comprised to the plaintiff. The principal and interest due upon the mortgage being in arrear, H. F. L'Estrange, the surviving mortgagee, on the 15th of September, 1851, gave notice to the plaintiff and the several other tenants to pay the rents to him instead of to the lessor. The plaintiff thereupon took legal advice as to the position in which this notice placed him: and it turned out that the lease under which the plaintiff held had been executed by the defendant without the assent of the mortgagees, whereas by the deed of assignment it was expressly provided that the power to lease should be exercised only with their assent and concurrence. The lease, therefore, was defective. Finding himself in this position, and being advised that he could not retain possession of the premises as against the mortgagee, the plaintiff consented to give up the possession to him. Now, though true it is, according to the authority of the cases which have been cited in the course of the argument, if the plaintiff had paid his rent to the mortgagee, such payment would have been an answer to any claim of rent on the part of his landlord, nevertheless the notice from the mortgagee would not have protected him against proceedings taken by his landlord for the recovery of the rent prior to such payment.

*235] The plaintiff, therefore, was in this *predicament,—he was liable to a distress at the suit of his lessor (whose title he could not dispute), if called on by him to pay his rent prior to the payment of it to the mortgagee; and, on the other hand, his lease being defeasible, he was liable to be evicted by the mortgagee; or, if he chose to pay rent to the latter, he would, instead of being in the position of a tenant holding under a beneficial lease, have been at the most a mere tenant from year to year. Under these circumstances, finding himself thus in the power

of the mortgagee, he consented to give up the premises to him. Upon this part of the case, I was at first during the argument disposed to think, that, independently of any entry by the mortgagee, the position in which the plaintiff was thus placed by finding himself called upon to become practically the tenant of the mortgagee, was in itself a breach of the covenant for quiet enjoyment, "without the let, suit, trouble, denial, eviction, *molestation*, or *disturbance* of the said Henry Parker, his heirs or assigns, or any person or persons claiming or deriving, or to claim or derive, by, from, or under him, them, or any of them." But I do not think it is necessary to decide that point, because, looking at the circumstances, and seeing that there was in point of fact an entry by the mortgagee, which the plaintiff could not resist, and seeing that the plaintiff was not called upon to sustain this double liability, to his lessor on the one hand, and to the mortgagee on the other, it was quite right and proper on his part to decline to remain in a position of so much difficulty and danger; and, when the mortgagee insisted upon his paying rent to him, and threatened, in the event of a refusal, to enforce the power which his position of mortgagee gave him, he (the plaintiff) had a right to give up the possession to him, and that was a sufficient entry by the mortgagee to satisfy this declaration. The only question which *remains, is, whether the eviction, which, if made by a person claiming by, from, or under the lessor, would constitute a [*236 breach of the covenant, *was* made by a person so claiming. As to that, I must confess I entertained some doubt when the case was under discussion yesterday. But, looking at the case with the light thrown upon it by the opportunity we have had of more closely inspecting the deeds, it seems to me to be perfectly clear that the term which was assigned by way of mortgage to the L'Estranges was created with the concurrence and co-operation of the defendant himself, and was assigned by his desire and for his benefit. There is no doubt, therefore, that the mortgagee claimed adversely to the plaintiff, and that the latter is entitled to say that he is a person claiming by, from, or under the defendant. I therefore think the allegation in the declaration, that the plaintiff was evicted by one claiming title to the premises by, from, and under the defendant, was made out. The only difficulty that arises is one that is capable of being at once rectified, viz. that the claim is alleged to be "by virtue *of a mortgage thereof theretofore to him made by the defendant.*" That is not strictly correct, the mortgage being in fact made by the assignment of the term from the trustees, Teed and White, to the L'Estranges. That being amended, I am of opinion that the plaintiff is entitled to judgment.

WILLIAMS, J.—I am entirely of the same opinion. But I think that the declaration should be amended by showing that the eviction was by one claiming by, from, or under the defendant. Two objections, then, are urged against the plaintiff's right to recover,—first, that it is not satisfactorily made out that there has been a disturbance or molestation by a person having legal title, so as to amount to a breach of the covenant *for quiet enjoyment,—secondly, that it is not shown that the disturber claimed by, from, or under the defendant. These are [*237 the two points into which the argument resolves itself. With regard to the first, I entirely agree in the view that has been presented by the Lord Chief Justice. A tenant who receives a notice from a person

claiming title under circumstances such as appear in this case,—a title paramount to that of the landlord,—is placed in a position of considerable peril: and probably the course which a prudent man would pursue would be at once to give up the possession; for, by remaining in, he might be called upon to pay the rent twice over. As long as he retains possession, he is estopped from denying the title of his lessor. It is true that several modes of extrication from the difficulty have been suggested, and some of very high authority. In one case, to which I adverted in the course of the argument,—Johnson v. Jones, 9 Ad. & E. 809 (E. C. L. R. vol. 36), 1 P. & D. 651,—it is said that the tenant may pay the rent to the mortgagee, treating it as an encumbrance on the land; and, having paid it, may avail himself of it as a payment in discharge of his liability to his lessor. But, assuming that that is good law, there is this difficulty in the case,—before the tenant has had an opportunity of complying with the requisition of the mortgagee, the landlord may distrain, and the tenant would have no answer to an avowry under such circumstances. Therefore it seems to me that the plaintiff was perfectly justified in law, and certainly in prudence, in declining to have anything more to do with the land: and, if he does so, and the person really having title comes in, that in my judgment amounts to an eviction by one having paramount title. The tenant is virtually compelled to abandon the premises: he is molested and disturbed in the enjoyment of the
*238] thing demised, in the strict sense of *the words. Under all the circumstances of the case,—the plaintiff having received notice to pay rent to the mortgagee, and having abandoned the possession to the claimant, who thereupon entered and took possession, having lawful title,—I entertain no doubt whatever that that was a clear disturbance of the tenant, and that it amounts in law to an eviction. And it is not the less an eviction, because on going out the tenant bargains with the mortgagee for a sum of money as a compensation for the expenses he had incurred in improving the premises. That arrangement cannot alter the legal character of the transaction. As to the second question,—whether or not it is shown that the mortgagee was a person claiming by, from, or under the defendant,—I think there can be no doubt when the deeds come to be carefully looked at. It may be that Mr. *Stammers* may be right in one sense in saying that the term of 1000 years is created under the will of John Robert Parker, the defendant's father, inasmuch as that term never could have existed but for that will. That may be the origin of the transaction. But it is quite clear that the term, which is the foundation of the title of the mortgagees, was created by the defendant himself in conjunction with the trustees. There cannot be a doubt, therefore, that the surviving mortgagee, to whose right the tenant attorned, was a person lawfully claiming by, through, and under the defendant. There are some decisions upon this point, though I do not think it is one which needs any authority. Thus, in Hurd v. Fletcher, Dougl. 43, a fine was levied of a feme covert's estate, with joint power to the husband and wife to declare the uses; and the uses were declared to the wife for life, &c., with remainder to A.: the husband afterwards made a lease, with a covenant for quiet enjoyment against any person
*239] claiming under him; and A. evicted the tenant: *it was held that an action lay upon the covenant against the executors of the husband. That was followed by Evans v. Vaughan, 4 B. & C. 261 (E. C.

L. R. vol. 10), 6 D. & R. 349 (E. C. L. R. vol. 16), where A., being seised in fee of an estate, by lease and release executed upon his marriage, settled the same upon himself for life, remainder to his first and other sons in tail, with a power to the tenant for life to grant leases for years, determinable on three lives: A. afterwards granted a lease of part of the estate in question for the lives of three persons therein named, and the life of the survivor, with a covenant that the lessee should quietly hold and enjoy the premises for and during the said term, without interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right, or interest by, from, or under him or any of his ancestors: the lease, being for three lives absolutely, was not conformable to the power, and became void on the death of A., and his eldest son brought an ejectment and evicted the lessee, two of the cestui que vies being then living: and it was held that the eldest son was a person claiming under the lessor, within the meaning of the covenant for quiet enjoyment; and that, by the words "during the said term" in that covenant, the parties intended a term to continue so long as any of the cestui que vies survived, and not a term to continue only for the life of the grantor. It seems to me that those cases fully establish the principle upon which this case must be decided, and that there clearly was a disturbance by one claiming under the defendant, within the meaning of the covenant for quiet enjoyment.

CROWDER, J.—I also am of opinion that there must be judgment for the plaintiff. The action is for the breach of a covenant for quiet enjoyment contained in a lease. The breach alleged, and upon which issue is taken, is, *that one L'Estrange,—who before and at the time of making the deed, and continually from thence until and at the time of the eviction and expulsion thereinafter mentioned, had, and who still hath, lawful right and title to the premises, with the appurtenances, *to wit, by virtue of a mortgage thereof theretofore to him made by the defendant*,—did enter into the said premises, with the appurtenances, and ejected, expelled, and removed the plaintiff therefrom, &c. Two objections have been urged on the part of the defendant,—first, that the fact of eviction is not established on the evidence,—secondly, that, assuming that there was an eviction in point of fact, it was not an eviction by a person claiming or deriving by, from, or under the defendant, within the meaning of the covenant. Upon the first point, I entertained some doubt during the argument. The breach specifically alleges an eviction and expulsion: it seemed to me to be necessary to establish the fact of an *eviction*, in order to sustain that allegation; and I was at first inclined to think that the facts set out in the case did not show an eviction, inasmuch as the plaintiff, the lessee, went out of his own accord, and suffered Mr. L'Estrange, the mortgagee, to come in. But, upon further consideration, I think the circumstances of the case merely amount to this, that the plaintiff went out, because, if he had not done so, he would have been turned out. It appears upon the case, that, upon receiving notice of Mr. L'Estrange's right and claim of rent, the plaintiff consulted an attorney, who advised him that he could not dispute Mr. L'Estrange's title, and that he thereupon quitted the premises, and Mr. L'Estrange entered. Suppose the advice of his attorney had been different, and the plaintiff had resisted Mr. L'Estrange's claim, and an ejectment had been brought against [*240

him, and possession recovered under it, beyond all question that *241] *would have been an eviction. I do not think he was bound to incur the expense of an action, the result of which could not for a moment be doubted. Under these circumstances, he enters into an arrangement with the claimant, and abandons a position which he finds to be utterly untenable. I think, therefore, that the fair construction of the evidence in the case, is, that there was an eviction and expulsion of the lessee. The next question is, whether, assuming that there was an eviction, it was an eviction by a stranger, or by a person claiming or deriving title by, from, or under the defendant, by virtue of a mortgage of the premises theretofore made to him by the defendant. I think it was not: the mortgage was not made by the defendant, but by the trustees, Teed and White, though the defendant was a party to the deed. The allegation, therefore, that the entry was by virtue of a mortgage made by the defendant to Mr. L'Estrange, is incorrect: but it may be made right by amendment; and, being amended in a way which is suggested by my Brother Willes, it will stand, that the plaintiff was molested and disturbed in his enjoyment of the demised premises by one having lawful right and title thereto by, from, and under the defendant, and not by or under the plaintiff. Throughout the argument yesterday, the court were not informed how the term was created: and I believe no one of the court was aware that it was in fact created by the deed of 1842, to which the defendant himself was a party. What we were considering, therefore, was, whether that was a mortgage in respect of which the mortgagee could be said to claim by, from, or under the defendant. But, upon a closer examination of the deeds, it is perfectly manifest that the term which was assigned was a term which term which had no existence prior to 1842. Then it was said that the authority to create the term was derived from the *242] *will of the defendant's father, and therefore the assignee of the term could not be said to claim title under the defendant. I do not assent to that proposition. It is true that the power to create the term was derived from the will. But who created the term? Why, the defendant and the trustees, for the purpose of raising a sum of money to pay the defendant's debts. How, then, can it be said that the assignee of that term is not a person claiming by, from, or under the defendant? Though, in point of form, the assignment is made by the two trustees, the assignee clearly is a person claiming through and under the defendant. It seems to me, therefore, that the plaintiff is entitled to judgment upon both points,—subject to the amendment of the breach in a manner which will be more particularly described by my Brother Willes.

WILLES, J.—I am entirely of the same opinion. The reasons for holding that the mortgagee claimed under the defendant, by virtue of a term created with his concurrence, have been so fully stated by my Lord and my two learned Brothers, that I have nothing to add on that point. With respect to the question whether that which took place was a breach of the covenant for quiet enjoyment, notwithstanding the ingenious argument of Mr. *Stammers*, I am of opinion that the facts stated in the case do make out a breach of that covenant. This declaration seems to have been very ingeniously framed to throw upon the plaintiff as much proof as possible. It states unnecessarily an eviction by a person claiming title. I am not sure, that, if it *were* necessary to establish an *evic-*

tion, there is not enough on the case to do so: but, at all events, there clearly is sufficient to establish a *molestation* or *disturbance*. It has been contended by Mr. *Stammers* that the plaintiff is estopped from relying upon what *took place between Mr. L'Estrange and himself as an eviction, by the circumstance of his having at the time [*243 of giving up possession of the land received from Mr. L'Estrange a sum of 75*l*. I do not, however, think that in any degree alters the rights of the parties. It is like the case of a tenant, on being turned out by one having a title paramount, asking and receiving compensation for expenses incurred by him in improvements. It does not amount to a consenting to be turned out: it was merely the act of a man, who, feeling that he could not resist the claim, makes the best he can of his position. At all events, if there be any difficulty in treating this technically and strictly as an eviction, it clearly amounts to a molestation or disturbance: and, as the declaration must be amended, I think it will be better to insert those words, which are in the covenant. I throw this out in consequence of something which I recollect to have fallen from Mr. Justice Maule in a case that was very much argued in this court a few years ago, but which I do not find to have been reported. I entirely agree with the rest of the court in thinking that the facts stated in the case show an eviction by one claiming by, from, or under the defendant; but I think it would be safer to allege a molestation and disturbance. Subject, therefore, to the approbation of my Lord and my two learned Brothers, I would suggest that the breach be amended, as follows,—striking out the words "but on the contrary thereof" (which should never be used in a declaration at all), and inserting in lieu thereof the word "and," and also striking out the words, "to wit, by virtue of a mortgage thereof theretofore to him made by," and inserting instead the words, "by, from, and under," and adding after "the defendant," the words "and not by or under the plaintiff," and inserting after the word "appurtenances," in the next line, the words "claiming *such [*244 right and title to the same as aforesaid, and molested and disturbed the plaintiff in his enjoyment thereof." The second plea, of course, must also be amended by traversing the molestation and disturbance. Upon the record as thus amended, the question is fairly raised, whether, upon the facts stated in this case, the plaintiff is entitled to recover. And we are all of opinion that he is.

COCKBURN, C. J.—I may add that I also thought the facts showed a molestation and disturbance which would entitle the plaintiff to recover for a breach of the covenant: but, considering that the circumstances amounted to an *eviction*, I thought it unnecessary to insist upon that, seeing the amount of amendment of the declaration which would be necessary in that view. Judgment for the plaintiff.

In Sprague *v.* Baker, 17 Mass. 586, it was held that, where lands which had been previously mortgaged, were conveyed with a covenant for quiet enjoyment, and the vendee subsequently, on a demand by the mortgagee for his money and on threat of suit, paid off the mortgage, this was sufficient breach of the covenant to entitle the vendee to maintain his action. It was said there by Wilde, J., "An ouster or expulsion is equivalent to an eviction by legal process. And so is any disturbance or interruption by a stranger having para-

mount title." See also that disturbance of title or possession, without actual eviction, is within the particular covenant: Corlis *v.* Denman's Executors, 3 Zabriskie, 271; Parker *v.* Dunn, 2 Jones N. C. 203; Chambers *v.* Peake, 6 Dana, 428. It seems settled in the United States, that the attornment and payment of rent by a tenant to a mortgagee, under a mortgage prior to the lease, on threat of entry, is lawful, and a defence to the suit: Welch *v.* Adams, 1 Metcalf, 494; Jones *v.* Clark, 20 Johns. 51; Magill *v.* Hinsdale, 6 Conn. 469.

GILES *v.* SPENCER. *May* 3.

The right of distress is not so inseparable an incident of rent-service as not to be capable of being postponed.

A., who was tenant of a house, let certain rooms on the ground-floor thereof to B., under a written agreement, for one year, and so on from year to year, subject to a quarter's notice, with a stipulation that no action, distress, or other proceeding should be prosecuted by or on behalf of A. in respect of the rent, unless he should have previously paid the rent due from himself to the superior landlord, and should have produced his receipt for the same to B. Upon B.'s death, C. (her daughter and executrix) continued to occupy the premises for some time upon the same terms as her mother had occupied them, and she afterwards agreed verbally with A. to give up the rooms on the ground-floor, and to take other rooms on the first floor in lieu of them, upon the same terms as to rent and otherwise:—Held, that, by the condition in the original agreement, A.'s right to distrain was postponed until after his rent had been paid; and that C. was therefore entitled to maintain trespass against a broker employed by A. to distrain without having previously complied with that condition.

And, held, that the substitution of the rooms on the first floor for those on the ground-floor, was not an alteration by parol of the terms of the original written agreement, but a new contract.

THIS was an action for breaking and entering the dwelling-house of the plaintiff, and seizing and carrying away her goods. The defendant pleaded not guilty "by statute."

*245] *The cause was tried before Cockburn, C. J., at the sittings at Westminster after last Michaelmas Term. The facts were as follows:—On the 20th of September, 1851, an agreement was entered into, in writing, between one Alexander Meredith, who was the tenant of a house in Seymour Street, Euston Square, and one Elizabeth Hales Giles, the mother of the plaintiff, whereby Meredith underlet to Mrs. Giles in the following terms:—

"An agreement made and entered into this 20th day of September, 1851, between Alexander Meredith, of No. 67 Seymour Street, Euston Square, in the county of Middlesex, for himself, his executors, administrators, and assigns, of the one part, and Elizabeth Hales Giles, of the same place, widow, for herself, her executors, administrators, and assigns, of the other part: The said Alexander Meredith hereby agrees to let, and the said Elizabeth Hales Giles agrees to take, the shop and rooms or apartments following, that is to say, two rooms on the ground floor, and the shop at the back or rear thereof, and also two rooms on the second floor, and the back kitchen, with the use of other conveniences, and the appurtenances thereto belonging, and also the fixtures and things in the said rooms and kitchen, being part of a house and premises which the said Alexander Meredith and Elizabeth Hales Giles now occupy, situate and being No. 67 Seymour Street, Euston Square,

aforesaid, to hold the same for the term of one whole year, from the 29th day of September instant, and so on from year to year until this agreement shall be determined by either of the said parties giving to the other of them six months' previous notice in writing for that purpose, at and under the yearly rent or sum of 44*l.* of lawful money of Great Britain, to be payable quarterly, and by even and equal portions, on the usual quarterly days for payment of rent, the first quarterly *payment to be made on the 25th day of December next: And the [*246 said Alexander Meredith doth hereby agree to pay and discharge all rates, taxes, duties, assessments, charges, and impositions whatsoever, parliamentary, parochial, or otherwise, which now are or shall at any time during the continuance of the said tenancy be assessed, rated, taxed, charged, or imposed upon the said premises, or upon the tenant or occupier in respect thereof. Provided always, and it is lastly agreed by and between the said parties hereto, that no action, distress, or other proceeding shall be commenced or prosecuted by or on behalf of the said Alexander Meredith, his executors, administrators, or assigns, in respect of the non-payment of the rent hereby reserved, unless and until the said Alexander Meredith, his executors, administrators, or assigns, shall have paid the rent due from him or them to the landlord or landlady of the said premises, and shall have produced and shown to the said Elizabeth Hales Giles, her executors, administrators, or assigns, the receipt or receipts for such rent. As witness the hands of the said parties, the day and year first above written."

Mrs. Giles continued for some time to occupy the apartments under this agreement: and, upon her death, in November, 1852, the plaintiff, her daughter, who was executrix and trustee under her will, continued the occupation upon the same terms. Some time after Mrs. Giles's death, it was verbally agreed between Meredith and the plaintiff, that, in lieu of the rooms on the ground floor, the latter should have other rooms on the first floor,—the terms of the holding, as to rent and otherwise, remaining the same.

Rent being due from the plaintiff to Meredith in respect of the new occupation, the latter, *without having previously paid the rent due from him to the superior landlord*, employed the defendant, a broker, to distrain *the plaintiff's goods, which was the trespass in respect of [*247 which this action was brought.

On the part of the defendant, it was insisted, that, as there had been a change in the subject-matter of the demise, such variation in the terms of the agreement ought to have been reduced into writing, and that parol evidence thereof was inadmissible.

His Lordship, thinking there was nothing in the objection, and that it was competent to the parties by parol to modify the right to distrain,—directed a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a verdict for him if the court should be of opinion that the objection was tenable.

Joyce, in Hilary Term last, accordingly obtained a rule nisi to enter a verdict for the defendant, "on the ground that the terms varying the lease as to the premises let ought to have been reduced into writing, and that parol evidence thereof was not admissible;" and also for a new trial, on the ground that the verdict was against the evidence, "the distress being lawful, and the agreement not to distrain mere matter of

contract, for which the plaintiff would have her remedy against Meredith by action." He submitted that the common-law right of the landlord to distrain could not be waived by parol.

J. Brown, in Easter Term, showed cause.—The law recognises only two descriptions of contracts, viz. contracts by deed, and contracts by parol,—whether in writing or by word of mouth: Rann *v.* Hughes, 7 T. R. 350, n. [COCKBURN, C. J.—The first agreement was in writing. When the change in the occupation took place, there was no writing. The question is, whether this incident,—making the right to distrain conditional—*can be introduced into the contract by parol. CRESSWELL, J.—Can the right to distrain, which is incident to the contract of tenancy, be waived by parol?] It is every day's practice to postpone a right of entry: and there can be no valid objection to the postponement of the right to distrain. "Quilibet potest renunciare juri pro se introducto." [COCKBURN, C. J.—The only question is, whether it can be done by parol.] The right to distrain for rent-service is incident to the reversion: that parted with, the right is gone. Here, the right of distress is postponed originally by the same instrument which gave the right to distrain. In Comyns's Digest, *Condition* (A. 1), it is said: "An express condition cannot be without deed, and therefore a man cannot plead a condition to defeat an estate of freehold, without showing the deed." And see the notes to Pordage *v.* Cole, 1 Wms. Saund. 320. The second point was not made at the trial. [CRESSWELL, J.—It comes substantially to the same thing. The contention was that the right of distress could not be waived by parol. If it could, it *was* waived, and, consequently, the defendant was a trespasser.] The demise was for two years certain and no longer, and therefore not within the statute of frauds, 29 Car. 2, c. 3, s. 4, and might be by parol. A man may grant a lease, together with a right of way, by parol, for less than three years; though he could not grant the way per se without deed. In Goss *v.* Lord Nugent, 5 B. & Ad. 58, 64 (E. C. L. R. vol. 27), 2 N. & M. 28 (E. C. L. R. vol. 28), Lord Denman, in delivering the judgment of the court, says: "By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract: but, *after the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract, which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement." And he adds,—"If the present contract was not subject to the control of any act of parliament, we think that it would have been competent for the parties by word of mouth to dispense with requiring a good title to the lot in question." So, where money is lent upon mortgage at a certain rate of interest, it is competent to the lender afterwards by parol to agree to reduce the rate: Lord Milton *v.* Edgworth, 5 Bro. P. C. 313. Many

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other instances may be put where a written contract may be varied in part or in whole, by the consent of the parties, after its execution.

Joyce, in support of his rule.—The right of distress is put higher than a specialty debt; and, if that cannot be discharged or varied by a parol contract, so the right to distrain cannot.—The agreement to waive or postpone the right of distress, is a personal contract, and not a contract running with the land, so as to bind the remainder-man or the issue. It is upon this principle that a court of equity will not decree specific performance of a contract to refer. [COCKBURN, C. J.—This agreement is not depriving any court of jurisdiction: it is merely postponing the remedy.] In Buller's N. P. p. 182, it is laid down, that, "if a landlord accept a *bond* for the rent, this does not extinguish it; for, the rent is higher, and the accepting of a security of an equal degree is not extinguishment of a debt, as, a *statute-staple for a bond." So, in Davis *v.* Gyde, 2 Ad. & E. 623 (E. C. L. R. vol. 29), 4 N. & M. 462 (E. C. L. R. vol. 30), it was held that a *promissory note* given and received for rent, does not extinguish the claim for such rent, which is a debt of a higher degree than that arising upon the note: nor does the receipt of such note of itself suspend the right of distraining. [COCKBURN, C. J.—There was no agreement there to take the promissory note in satisfaction of the landlord's right to distrain.] A covenant not to sue upon a simple contract debt for a limited time, is not pleadable in bar of an action for such debt: Thimbleby *v.* Barron, 3 M. & W. 210.† The true principle is that stated by Maule, J., in the course of the argument in Avery *v.* Scott, 8 Exch. 487, 499,†—"There is no decision which prevents two persons from agreeing that a sum of money shall be paid upon a contingency; but they cannot legally agree, that, when it is payable, no action shall be maintained for it." So, here, if the parties had agreed that no right to distrain should arise but upon a certain contingency, that might have done: they have not, however, done so: they have merely agreed that the landlord shall be deprived of all legal remedies for his rent, until he shall prove by production of his receipt that he has paid the superior landlord,—a mere agreement to suspend the remedy, which can have no operation at all in law. [*250

Cur. adv. vult.

WILLES, J., now delivered the judgment of the court:—

In this case, one Meredith, being tenant of a house, underlet certain rooms in it to the plaintiff by a written agreement, providing, inter alia, that no distress should be made for rent until after Meredith had produced to the plaintiff the receipt of the superior landlord for the rent which had previously become due from him.

Some time afterwards, it was agreed by word of *mouth between the plaintiff and Meredith, that the former should take of the latter other rooms in lieu of the first, but upon the same terms as to the rent and otherwise. The plaintiff accordingly gave up the first rooms, and entered upon and occupied the second until Meredith, without paying his landlord certain rent which had become due, or producing a receipt for it to the plaintiff, distrained, by the defendant and his broker, upon those rooms for rent in arrear from the plaintiff to him since her occupation thereof. [*251

The plaintiff thereupon brought this action; and, at the trial before the Lord Chief Justice, the defendant insisted upon Meredith's right to

distrain, arguing "that the terms varying the lease as to the premises let, ought to have been reduced into writing, and that parol evidence thereof was not admissible." The Lord Chief Justice, however, directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him upon the above point.

A rule was accordingly obtained to enter a verdict for the defendant, or for a new trial upon the above ground; and a second point was made, that the verdict was against the evidence, the distress being lawful, and the agreement not to distrain mere matter of contract, for which the plaintiff would have her remedy against Meredith by action.

Upon the argument before the Lord Chief Justice and my Brothers Cresswell and Crowder and myself, the point reserved was abandoned; nor could it have been maintained, the taking of the second set of rooms having been a new contract by parol upon the terms of the first written contract, and not an alteration of the terms of that contract. The first contract was for this purpose like the written rules in Lord Bolton *v.* Tomlin, 5 Ad. & E. 856 (E. C. L. R. vol. 31), 1 Nev. & P. 247 (E. C. L. R. vol. 36). The liability of the plaintiff upon it was probably put an
*252] end to by a *surrender by operation of law, or, if not, then by an implied agreement not to sue for the rent, in consideration of the rooms being given up: see Gore *v.* Wright, 8 Ad. & E. 118 (E. C. L. R. vol. 35), 3 N. & P. 243.

The defendant, however, argued, upon the second point in the rule, which was not taken at the trial, and not reserved, that there ought to be a new trial.

The only point argued before us, was, that the agreement not to distrain was merely matter of contract, and had no specific effect upon the right of distress, so as to entitle the plaintiff to maintain an action of trespass or replevin.

Upon the argument, the authorities bearing upon the question were not referred to by counsel on either side. We proceed to consider it, with the aid of some of those authorities, which we have found for ourselves.

It is obvious that the argument for the defendant must go the length of saying, not only that rent-service and distress, though the creatures of the contract of tenancy, cannot by the same contract be severed from one another, but also that distress is so inseparable an incident of rent-service as not to be capable even of postponement.

It is said, however, in a note to Longo Quinto, T. fo. 41, to have been laid down in 40 Ed. 3 (probably 40 Ed. 3, fo. 22, per Wichingham, J.; see continuation of same case, fo. 47), that even fealty "may be postponed for two or three years."(*a*) This is in effect what the contract purports to do in the present case as to the distress.

There is also some learning upon the point whether the distress may be entirely released, leaving the rent seck. In T. 7 Ed. 4, fo. 11, the
*253] Chief Justice assented to the argument of counsel, that distress was an *inseparable incident to a rent-service, and therefore could not be released: but Nedham, J., was of the contrary opinion, saying, with apparent reason, that the release would be good, and would convert the rent into a rent-seck.

(*a*) "Jeo puis graunt q. il n'avera fealtie per ceux deux ans, et p. cosequens extinct a touts jours." 40 E. 3, fo. 22, pl. 21.

In Brooke's Abridgment, *Releases*, pl. 47, the case first referred to is cited as an authority, that, even an inseparable incident, such as fealty, may be postponed, though not absolutely released; whilst the case in 7 E. 4 secondly above cited is referred to in different places,—see "Incidents," 20, "Tenures," 38,—as an authority for each of the conflicting opinions therein expressed by the judges.

The proposition laid down in 40 E. 3, and referred to in Longo Quinto, is confirmed by what is put by Lord Coke in Co. Litt. 204 b, where he says, that, "if a lease be in the affirmative, that, if the rent be in arrear for thirty days, the landlord may distrain, yet he may distrain within the thirty days; for, the words are in the affirmative, and *so* cannot take away what is incident of common right,"—plainly implying that such a provision in negative words would be valid.

In Viner's Abridgment, "Releases" (G.), it is laid down, upon the authority of the cases in the Year Books, that fealty or distress may be postponed.

In Horsford *v.* Webster, 1 C. M. & R. 696,† no difficulty was suggested on the bench or at the bar as to the specific effect of an agreement by a landlord not to distrain the goods of a stranger upon the land.

The above authorities are quite sufficient to show that what the parties have undoubtedly agreed to in point of fact, is capable of being sustained in point of law. The verdict was therefore right, and the rule to set it aside must be discharged. Rule discharged.

Where a promissory note is taken in absolute payment of rent, the right of distress is gone: Warren *v.* Forney, 13 Serg. & R. 52. But in general, a bond, note, order on a third person, or even a judgment for the rent itself, until satisfaction, will not produce that effect: Bantleon *v.* Smith, 2 Binney, 146; Snyder *v.* Kunkleman, 3 Penna. 490; Bailey *v.* Wright, 3 McCord, 484; Cornell *v.* Lamb, 20 Johns. 407. Nor will an express right of entry for non-payment of rent divest the right of distress: Smith *v.* Meanor, 16 Serg. & R. 275. Where, however, on the surrender of a lease it was agreed that the tenant should remain liable for a year's rent, and that the lessor might take all lawful means for its recovery, it was held that the landlord could not distrain for such rent, but that the remedy was on the agreement: Bain *v.* Clark, 10 Johns. 424.

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*THOMSON *v.* HARDING, Official Manager of THE ROYAL BRITISH BANK.—In re HILL. *Nov.* 17. [*254

The court will, in virtue of its inherent power to prevent the abuse of its process, discharge from custody one who is improperly detained in execution in respect of a debt from which he is discharged by his certificate under the bankrupt act.

A. obtained judgment in an action against the official manager of a joint stock bank, and, having proved his debt under a fiat against the bank, and also under the 73d section of the Winding-up Act, 7 & 8 Vict. c. 111, attempted likewise to prove it under a fiat against B., a shareholder, against whom he had obtained an order for execution under the 7 & 8 Vict. c. 113, s. 13: the commissioner declining to admit the debt to *proof*, but receiving it as a *claim*, A. afterwards sued out a ca. sa. against B., and took him in execution *after he had obtained his certificate*:—Held, that B. was entitled to be discharged, on motion,—either by virtue of the 205th section of the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, or by virtue of the general inherent jurisdiction of the court over its own process.

THE Royal British Bank became bankrupt on the 9th of October, 1856. On the 13th of December, the plaintiff obtained judgment against the bank in an action brought against Harding, the official manager appointed under the Winding-up Act, 11 & 12 Vict. c. 45; and on the 23d he proved his debt under the fiat against the bank. On the 31st of January, 1857, the plaintiff obtained an order for execution against Hill, under the 7 & 8 Vict. c. 113, s. 13, and issued a fi. fa. thereon, which was defeated by a bill of sale. On the 13th of February, a fiat in bankruptcy issued against Hill, under which he was duly adjudged bankrupt. In April, the plaintiff applied to the commissioner to be allowed to prove his debt under Hill's fiat; the commissioner refused to allow it as a "proof," but admitted it as a "claim," under the 140th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106. On the 13th of May, Hill obtained a certificate of the first class. On the 11th of August, Hill was arrested on a ca. sa. at the suit of the plaintiff. Application was made to Wightman, J., at chambers, for his discharge, but that learned judge referred the matter to the court. The case was afterwards brought before Martin, B., and Willes, J.; but, under the circumstances, they did not think proper to order the discharge of Mr. Hill, but the following order was made by Willes, J.,—"that upon payment of the amount of the reserved divi-
*255] dend into court, to abide such order as the court or a judge may *think fit to make respecting it, having regard to the equities of the case, the defendant [Hill] consenting that the court or a judge may order the plaintiff to retake him on the writ already issued; or any other writ to be issued, be discharged out of custody as to this action,—the costs of the application to be in the discretion of the said court or judge."

Mr. Hill, being unable to comply with the condition imposed upon him by this order, remained in custody.

Lush, Q. C., on a former day in this term, obtained a rule nisi for his discharge.

Byles, Serjt., now showed cause.—By the 100th section of the 7 & 8 Vict. c. 113, the creditor is bound to prove under the fiat against the bank, and also, by 11 & 12 Vict. c. 45, s. 73, under the winding-up act, before he can obtain an order for execution against a shareholder. The plaintiff claimed to prove under Hill's fiat in respect of the new debt created by that order; but the commissioner held that he was not entitled so to do. [WILLES, J.—The certificate bars all debts, whether joint or separate.] True; but the debt created by the order of the court is not the same debt as that due from the bank. The law as to double proof is well stated by Lord Justice Turner, in the case of Ex parte Goldsmid, In re Deane and Youle, 25 Law J., Bankr. 25. George Deane and Frederick Youle carried on business at Liverpool, under the firm of "Deane, Youle & Co." They also carried on business at Pernambuco in partnership with one Alfred Philip Youle,—the two firms being perfectly distinct, and Alfred Philip Youle having no interest in the Liverpool business. The Pernambuco house drew bills upon and they were accepted by the Liverpool house bonâ fide and in the ordinary course of business, and
*256] two of such bills came into the hands of *Goldsmid honestly in the due course of trade: the Liverpool firm became bankrupts, and afterwards the Pernambuco firm entered into a "concordata" with their

creditors, under which they vested property in the trustees for the benefit of their creditors: Goldsmid received a dividend under the "concordata," out of the assets vested in the trustees of the Pernambuco firm, as drawers of the bill: they subsequently attempted to prove against the Liverpool firm as acceptors of the bill, but the commissioner held that there was no right of double proof; and his decision was affirmed on appeal,—Lord Justice Knight Bruce dissenting. Lord Justice Turner, in giving judgment, says:—"The rule has long been settled, that, in the administration of estates in bankruptcy, the joint estate is to be distributed amongst the joint creditors, and the separate estate amongst the separate creditors; the surplus of the joint estate, after payment of the joint debts, going over to the separate estates, and the surplus of the separate estate, after payment of the separate debts, going over to the joint estate. In bankruptcy, too, all the creditors upon the same estate stand upon an equal footing: but, as observed by Lord Hardwicke in Ex parte Bond, 1 Atk. 98, if a creditor, having a joint and separate security, be permitted to prove against both the joint and separate estates, he draws from the separate estate to the prejudice of other joint creditors who have an equal right with himself to come upon that estate. From this consequence, coupled with the analogy derived from the rule at law, that the obligee in a joint and several bond cannot sue the obligors, and each of them severally, at the same time, a further rule has also been established in bankruptcy, that, generally speaking, a joint and separate creditor cannot prove against both the joint and separate estates, but must elect against which of them he will prove. Whether *these [*257
rules are founded upon just principles, or based upon sound reasoning, it is not for us to determine. They are woven into the system of the bankrupt laws, and we are bound to abide by them." [WILLIAMS, J.—I must confess I do not see the applicability of that case to the present.] It shows that the commissioner was right in declining to allow the plaintiff to prove against the separate estate of Hill: and, if so, he had a right to proceed as he has done. But, assuming that Mr. Hill is improperly detained, this is not the proper tribunal to apply to for relief; but the court of review, when it existed, or the Great Seal: Ransford *v.* Barry, 7 Dowl. P. C. 807; Ex parte Diack, 2 Mont. & Ayr. 675; Ex parte Bernasconi, 2 Glyn & J. 381. The 205th section of the 12 & 13 Vict. c. 106, does not apply to this case. The first branch relates to mesne process: it enacts that "any bankrupt who shall, after his certificate shall have been allowed, be arrested, or have any action brought against him for any debt, claim, or demand provable under his bankruptcy, shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence:" and the latter branch relates to final process,—"and, if any such bankrupt shall be taken in execution or detained in prison for such debt, claim, or demand, where judgment has been obtained before the allowance of his certificate, *it shall be lawful* for any judge of the court wherein judgment has been so obtained, on such bankrupt producing his certificate, to order any officer who shall have such bankrupt in custody by virtue of such execution, to discharge such bankrupt," &c. Here, no judgment has been obtained against Hill,—only a judgment in an action against the official manager of the Royal British Bank. [COCKBURN, C. J.—Which is made

*258] by the subsequent proceeding *under the statute equivalent to a judgment against Hill.] The question is, whether the order upon Hill under the 7 & 8 Vict. c. 113, s. 13, is a judgment against him within the meaning of the 205th section of the bankrupt act. It is clearly not within the words. [CROWDER, J.—Why not? Mr. Hill is detained for a debt or demand for which judgment had been obtained before the allowance of his certificate.] It is not a judgment against *him*. [COCKBURN, C. J.—The words of the 205th section do not require that it shall be a judgment *against him*. The case is certainly within the mischief which the statute intended to remedy.] It is at all events discretionary with the court, to discharge the party from custody or not. [COCKBURN, C. J.—Justice *requires* us to discharge him, if a proper case be made out. The whole policy of the law is opposed to his detention.]

Lush, Q. C. (with whom was *Griffits*), contrà.—Whether the commissioner was right or wrong in refusing to allow the plaintiff to prove this debt under the separate fiat against Hill, is perfectly immaterial. The certificate discharges the bankrupt from all debts, whether joint or separate, due by him when he became bankrupt, and from all claims and demands made provable under the bankruptcy: 12 & 13 Vict. c. 106, s. 200. The distribution of the estates is a totally different matter. The case of Ex parte Goldsmid, 25 Law J., Bankr. 25, has no bearing whatever upon this. This case comes clearly within the words of the 205th section. If this had been an action against Hill, the entry of a claim on the proceedings would have been an election by the creditor to take the benefit of the fiat, and a relinquishment of the action: s. 182. The 9th section of the act for the regulation of joint stock banks, 7 & 8 Vict.

*259] c. 113, enacts that *"every judgment, decree, or order of any court of justice in any proceeding against the company, may be lawfully executed against, and shall have the like effect on, the property and effects of the company, and also, subject to the provisions hereinafter contained, upon the person, property, and effects of every shareholder and former shareholder thereof, as if every individual shareholder and former shareholder had been by name a party to such proceeding." The 10th section enacts that "it shall be lawful for the plaintiff to cause execution upon any judgment, decree, or order obtained by him in any such action or suit against the company, to be issued against the property and effects of the company; and, *if such execution shall be ineffectual to obtain satisfaction of the sums sought to be recovered thereby*, then it shall be lawful for him to have execution, in satisfaction of such judgment, decree, or order, against the person, property, and effects of any shareholder, or, in default of obtaining satisfaction of such judgment, decree, or order from any shareholder, against the person, property, and effects of any person who was a shareholder of the company at the time when the cause of action against the company arose:" and then follows a proviso limiting the extent of the liability of former shareholders. Then comes the 13th section, which provides for the mode of enforcing judgments against shareholders, and which enacts, "that, in the cases provided by this act for execution on any judgment, decree, or order, in any action or suit against the company, to be issued against the person or against the property and effects of any shareholder or former shareholder of such company,—or against the property and effects of the company at the suit of any shareholder or former shareholder, in satisfaction

of any money, damages, costs, and expenses paid or incurred by him as aforesaid in any action or suit against the company,—*such execution may be issued, by leave of the court, or of a judge of the court in which such judgment, decree, or order shall have been obtained, upon motion or summons for a rule to show cause, or other motion or summons consistent with the practice of the court, without any suggestion or scire facias in that behalf; and that it shall be lawful for such court or judge to make absolute or discharge such rule, or allow or discharge such motion (as the case may be), and to direct the costs of the application to be paid by either party, or to make such order therein as to such court or judge shall seem fit," &c. Reading those sections with the 205th section of the Bankrupt Act, there can be no doubt that the present case falls within the very words as well as within the spirit of that enactment. Knowing that a judgment against a joint stock bank might become in effect a judgment debt against each of the shareholders, the legislature, in s. 205, cautiously abstains from using language limiting it to a judgment against the bankrupt individually. An attachment for non-payment of money or costs is not a "judgment;" and yet the courts always discharged parties from custody under attachments, where they had become bankrupt, and had obtained certificates: The King *v.* Edwards, 9 B. & C. 652 (E. C. L. R. vol. 17). [They were here stopped by the court.] [*260

COCKBURN, C. J.—I am of opinion that this rule must be made absolute. It appears that Mr. Hill was a shareholder or partner in a joint stock banking company, that the company had become bankrupt, that the plaintiff had obtained judgment in an action against them, that he duly proved the debt against the bank, and, being unable to obtain satisfaction thereof out of the property of the company, afterwards procured an order for an execution against Hill as a shareholder. Hill in the mean time had become bankrupt in his *individual character, apart from his character as shareholder in the company; and, under his bankruptcy, his estate would in the first instance be available for payment of his separate creditors, and any surplus would go towards satisfaction of the debts of the company. The plaintiff applied to the commissioner to be allowed to prove his demand under the fiat against Hill; but the commissioner declined to allow it to be proved, but permitted it to be entered as a "claim," to be postponed until after all the separate creditors should have been satisfied. In either case, Hill would be entitled to the protection of the bankrupt laws. As a member of the partnership he was a bankrupt; and the joint property of the partnership was available in the first instance towards satisfaction of the joint debts. As an individual bankrupt, his property was available in the first instance to satisfy the debts owing by him individually. When he obtained his certificate of conformity, he was entitled to personal immunity against any execution which might be issued in reference either to a partnership or a separate liability. We are not called upon to decide whether the learned commissioner was right or not in holding that the plaintiff's demand was admissible as a "claim" against the separate estate of Hill. We have nothing whatever to do with that. It is enough for us to say, that, whether as a bankrupt in connexion with the company, or on his separate account, he is entitled to personal immunity. The only remaining question is, whether this court is the proper tribunal to resort to for his liberation. I am of opinion that the application is properly made [*261

to this court, under whose process he has been arrested. It seems to me that the case is within the terms, and it certainly is within the spirit of the 205th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, which enacts "that any bankrupt who shall, after his *262] *certificate shall have been allowed, be arrested, or have any action brought against him, for any debt, claim, or demand provable under his bankruptcy, shall be discharged, &c.; and, if any such bankrupt shall be taken in execution or detained in prison for such debt, claim, or demand, where judgment has been obtained before the allowance of his certificate, it shall be lawful for any judge of the court wherein judgment has been so obtained, on such bankrupt producing his certificate, to order any officer who shall have such bankrupt in custody by virtue of such execution, to discharge such bankrupt," &c. The plaintiff having obtained a judgment against the bank, and failing to obtain satisfaction out of the property of the company, procured an order for an execution against Hill pursuant to the provisions of the 7 & 8 Vict. c. 113. I cannot but think that the language of the 12 & 13 Vict. c. 106, s. 205, applies to such a case, and that this person is in custody substantially under an execution upon the judgment. It has been very properly observed by Mr. *Lush*, that, when that section speaks of the bankrupt having been taken in execution upon a judgment, it studiously avoids speaking of a judgment obtained against him individually. I think, therefore, we might safely act upon that section, even if we had no jurisdiction independently of it. But I think the court has an inherent jurisdiction to prevent the abuse of its process, and that the moment Hill obtained his certificate, it was an abuse of the process of this court to detain him in custody under it. I therefore am of opinion that Hill is entitled to protection and immunity under the 205th section of the bankrupt act, and that the application for his discharge was properly made to this court.

CROWDER, J.—I am of the same opinion. It is unnecessary to deter- *263] mine whether the commissioner was *right or wrong in admitting the amount due on the judgment against the bank as a claim under Hill's bankruptcy, because I think that in any view he is improperly detained in custody. It is said that the application for his discharge should have been made to the Court of Bankruptcy. But it seems to me that the Court of Bankruptcy can have nothing to do with the detention of a party upon an execution issued under an order of this court. This court clearly must be the proper tribunal for that purpose. I am very much disposed to think that the case comes within the 205th section of the bankrupt act: there is great force in the observation that the language of that section is not limited to a judgment against the individual. At the same time, however, I would rather rest my judgment upon the general inherent jurisdiction of the court to discharge from custody a person found detained under its process, who has a right to be discharged. Under the circumstances, it seems to me that we are bound to discharge Mr. Hill.

WILLES, J.—I am entirely of the same opinion. If, instead of proceeding under the 13th section of the 7 & 8 Vict. c. 113, the plaintiff had proceeded under the 10th section, by scire facias, it is quite clear that he would have had a judgment against Hill which would have constituted a debt: Marston *v.* Lund, 16 Q. B. 344 (E. C. L. R. vol. 71).

Having obtained his certificate of conformity under the fiat against him, Hill would unquestionably have been discharged from that debt; and might either have applied to the court under the 205th section of the 12 & 13 Vict. c. 106, or have proceeded by auditâ querelâ. The only difference between that supposed case and this, is, that here the plaintiff has obtained an order of this court for execution against Hill upon the judgment obtained against the bank, under *s. 13, instead of proceeding by scire facias under s. 10. But I think it is quite clear [*264 that the legislature intended the effect of the proceedings under both sections in this respect to be the same, the only difference being that the one is a shorter course than the other. It is said that the case is not within the 205th section of the 12 & 13 Vict. c. 106, because there is no judgment against Mr. Hill: but, if not literally within the *words*, it is evidently within the *intention* of the legislature. And I quite agree that the court has power to interfere in all cases to prevent an abuse of its process. I do not wish to impute oppression to the plaintiff in this case: but, under all the circumstances, I do think it would be most oppressive and unjust to allow him to detain Mr. Hill in custody. There is a case of Woodward *v.* Meredith, 2 D. & L. 135, where Coleridge, J., stayed proceedings under circumstances very similar to those in Ransford *v.* Barry, and giving some very excellent reasons for supposing that the judgment of Lord Wenleysdale (for whose opinions one has always the highest respect) is not accurately represented by the reporter. In that case (Woodward *v.* Meredith) the plaintiffs recovered a verdict in an action of assumpsit on two bills of exchange, for 68*l.* 6*s.* damages and costs, and signed judgment after a fiat in bankruptcy had issued against the defendant: they afterwards proved under the fiat for the amount of the bills, the commissioner refusing to allow them to prove for the costs: the bankrupt never obtained his certificate, nor was any dividend paid: subsequently, the plaintiffs sued out a writ of scire facias to revive the judgment solely with the view of recovering the costs; and Coleridge, J., in making absolute a rule to stay the proceedings, says,— "It cannot, I think, be well doubted, that, in the exercise of that control over the proceedings of parties litigant, which our courts now constantly exercise, we may interfere *to stay them when they are clearly [*265 in violation of a statute, and can tend to no useful result. The court here sees it admitted that the plaintiff has done that the legal effect of which is a relinquishment of his action, for the present at least, and yet is attempting to proceed to execution in it. If it were not to interfere, it would only drive the defendant to apply to a court of equity for protection, which it ought not to do where it is perfectly competent itself to afford the same. It is quite in analogy with its usual course, to interfere and stay, either absolutely or until the happening of a certain event, or the performance of a certain act, the proceedings in a case which for the present the plaintiff has no right to carry on." Some very strong observations as to the power of the court are made by Alderson, B., in an earlier case of Cocker *v.* Tempest, 7 M. & W. 502:† "The power," he says, "of each court over its own process is unlimited: it is a power incident to all courts, inferior as well as superior: were it not so, the court would be obliged to sit still and see its own process abused for the purpose of injustice. The exercise of the power is certainly a matter for the most careful discretion; and, where there are

conflicting statements of facts, I agree that it is in general much better not to try the question between the parties on affidavit. The power must be used equitably; but, if it be made out that the process of the court is used against good faith, the court ought to interfere to prevent it, for the purpose of administering justice. The distinction between this power and that which is exercised by a court of equity in granting an injunction, is, that the injunction stops proceedings in another court, this only in the court in which the proceedings are." Another point arises here. It is plain that this is a debt,—a liquidated money demand; and, but for the circumstance of these banking companies
*266] being corporations, there would *be no difficulty in dealing with the case: this would be an ordinary partnership debt, and would be discharged by the certificate. But for the provisions (ss. 10—13) of the 7 & 8 Vict. c. 113, the shareholders would not be liable at all. We must, therefore, look and see what remedy those sections intended to give to the creditor. They give him a peculiar remedy by scire facias or motion for execution to recover a debt, a money demand, which would be barred by a certificate. When an order under s. 13 has been obtained against a shareholder, he is at once liable to be taken in execution. If that does not constitute a "debt," I cannot conceive what would bring any liability within that category. With regard to the decision of the commissioner,—all that he seems to have decided, was, that, notwithstanding the peculiar machinery provided by the statute, the debt still remained a joint debt, and, having elected to prove against the joint estate, the creditor could not be allowed also to prove against the separate estate. I am by no means satisfied that his decision was not quite right: but, even if he were wrong, it makes no difference so far as regards the right of the applicant to be discharged from custody. I may add that I should have made an order for the discharge of Mr. Hill in vacation, but for the circumstance of the matter having been already before another judge, who entertained doubts about it.

Rule absolute.

*267] REYNOLDS v. HARRIS. *June* 12.

Upon a reference of *all matters in difference in a cause*,—"the costs of the cause, and also the costs of the order and of the reference and award, to abide the event of the award,"—with power to the arbitrator to direct how the verdict in the cause should be entered; the costs of the cause follow the event of the cause as decided by the award.

In slander, the declaration contained four counts: the defendant pleaded not guilty to the whole declaration, and further to the second count a multifarious plea of justification setting forth three several circumstantial statements of misconduct on the part of the plaintiff, any one of which would be a sufficient answer to the count: the plaintiff took issue on the pleas; and, upon a reference of "all matters in difference in the cause," with a provision that "the costs of the cause, and also the costs of the order and of the reference and award, should abide the event of the award," and that "the arbitrator should have power to direct how the verdict in the cause should be entered,"—the arbitrator found, upon not guilty, for the plaintiff as to the second and fourth, and for the defendant as to the first and third counts; and, as to the second issue, he found that the plea, so far as related to one of the matters justified, was proved, and as to the rest not proved; and, being of opinion that the part proved was an answer to the second count, he assessed no damages for the plaintiff on that count, but assessed his damages on the fourth count at 40*s.*:—Held, that the proper principle of taxation was, to allow the plaintiff no costs of any part of the plea of justification, and the defendant costs only of the part expressly found to be true, including costs of evidence applicable to

such part, though also applicable to the residue of the plea, but not costs of any evidence applicable exclusively to that part of the plea which was found to be untrue.

THIS was an action of slander. The first count of the declaration stated, that, before this suit, whilst one Mr. Furnell was walking in the company of the plaintiff, the defendant, addressing the said Mr. Furnell, falsely and maliciously spoke and published of the plaintiff the words following, that is to say, "I (meaning the defendant) am sorry to see you, Furnell (meaning the said Mr. Furnell), walking in the company of a thief" (meaning the plaintiff), the defendant meaning thereby that the plaintiff was a thief.

The second count stated, that, before and at the time of the committing by the defendant of the grievances next thereinafter mentioned, the plaintiff was and still is carrying on a certain trade and business, to wit, the trade and business of a shipowner, broker for the sale of ships, ship insurance, and general broker, and seller of shares in ships; and that, before this suit, whilst one Mr. Furnell was walking in the company of the plaintiff, the defendant, addressing the said Mr. Furnell, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in and in relation to his said trade and business, *the words following, that is to say, "I (meaning the defendant) am sorry to see you, Furnell (meaning the said Mr. Furnell), walking in the company of a thief" (meaning the plaintiff), the defendant meaning thereby that the plaintiff had been guilty of dishonesty, fraud, and cheating, in and about and in relation to his said trade and business. [*268

The third count stated that the plaintiff, before and at the time of the committing by the defendant of the grievances next thereinafter mentioned, was and still is, to wit, in partnership with a certain other person, the managing owner and ship's husband of certain ships, being employed in such business by the respective part owners of the said ships; and that, before this suit, whilst one Mr. Furnell was walking in the company of the plaintiff, the defendant, addressing the said Mr. Furnell, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in and in relation to his said business as such managing owner and ship's husband as aforesaid, the words following, that is to say, "I (meaning the defendant) am sorry to see you, Furnell (meaning the said Mr. Furnell), in the company of a thief" (meaning the plaintiff), the defendant meaning thereby that the plaintiff had been guilty of dishonesty, fraud, and cheating in and about and in relation to his said business as such managing owner and ship's husband as aforesaid.

The fourth count stated, that, before and at the time of the committing by the defendant of the grievances thereinafter mentioned, the plaintiff exercised, and thence continually had exercised, and still was exercising, the business of a broker for the sale of ships, and of a seller of shares in ships, and had represented to the defendant that he the plaintiff was of opinion, that, if the defendant would purchase of and from him certain shares in certain ships, which he the plaintiff then *had to sell, the same would yield profit to the defendant, and the defendant was induced to purchase and did purchase the said shares of and from the plaintiff; that, in and about the said representation concerning and the said sale of the said shares, he the plaintiff con- [*269

ducted himself with fairness, honesty, and integrity; yet that the defendant falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in and in relation to his said last-mentioned business, and of and concerning the plaintiff's conduct in and about the said representation concerning and the said sale of the said shares, the words following, that is to say, "It (meaning the conduct of the plaintiff in and about the said representation concerning and the said sale of the said shares) was a swindle to get the money (meaning the purchase-money of and for the said shares) out of my (meaning the defendant's) pocket for the ships (meaning the said ships), and he (meaning the plaintiff) knew when he (meaning the plaintiff) induced me (meaning the defendant) to take shares (meaning the said shares) that they (meaning the said shares) would not make the profit" (meaning the profit which the plaintiff had represented that in his opinion they would make), the defendant thereby meaning that the plaintiff had by fraudulent representations, and with intent to cheat the defendant, induced the defendant to purchase the said shares. Claim 1000*l.*

The defendant pleaded,—first, not guilty.

Secondly, to the second count, that, while the plaintiff carried on the trade and business therein mentioned, and before the committing of the grievances in that count mentioned, the plaintiff was employed in the way of his said trade and business to negotiate a charter-party of a ship called the Orynthia, belonging to Messrs. Bradly & Potts, of Sunderland, *270] and which *ship was accordingly chartered by the said Messrs. Bradly & Potts to a Mr. Goddard through the agency of the plaintiff in the way of his said trade or business; that before the committing of the said grievances, the plaintiff was employed in the way of his said trade and business to arrange the terms upon which the said charter-party should be cancelled; and that the plaintiff accordingly in the way of his said trade and business arranged the said terms, and induced the said Messrs. Bradly & Potts to agree to pay, and the said Messrs. Bradly & Potts did pay, a large sum, to wit, 300*l.*, to the said Mr. Goddard, as the price of the said cancelment, and thereupon the said charter-party was cancelled accordingly; whereas in truth and in fact the said Mr. Goddard was willing to accept, and did accept, a much smaller sum, to wit, 100*l.*, as the price of the said cancelment, as the plaintiff then well knew; and the plaintiff then, and before the committing of the said grievances, and while he so carried on the said trade and business, fraudulently, falsely, knowingly, and dishonestly represented to the said Messrs. Bradly & Potts that the whole amount agreed to be paid by them was the amount which the said Mr. Goddard was willing to accept for the said cancelment as aforesaid, and thereby cheated the said Messrs. Bradly & Potts out of the residue of the said money: that, while the plaintiff carried on the said trade and business in the said second count mentioned, and before the committing of the grievances in the said second count mentioned, the plaintiff was employed in the way of his said trade and business by the said Mr. Goddard, to negotiate for him the purchase of a certain share in a ship called the Baroness, which ship belonged to the said Messrs. Bradly & Potts, and the plaintiff accordingly in the way of his said trade and business negotiated the said purchase at and for a certain sum, to *wit, 1200*l.*, and the same was then sold by the said Messrs. Bradly& Potts at [*271

that price accordingly; and that the plaintiff, before the committing of the grievances, fraudulently, falsely, and dishonestly represented to the said Mr. Goddard that the sum which he had agreed on behalf of the said Mr. Goddard to give to the said Messrs. Bradly and Potts for the sale of the said share as aforesaid, was a much larger sum than that actually agreed upon as aforesaid, to wit, 1400*l.*, and thereby fraudulently and dishonestly induced the said Mr. Goddard to pay him such larger sum, and thereby cheated and defrauded the said Mr. Goddard out of the difference: that, while the plaintiff carried on such trade or business as in that count mentioned, and before the committing of the grievances in that count mentioned, the plaintiff was employed in the way of his said trade and business, by the defendant and the other part owners of a ship called the Treasure, to act as broker of the said ship, and it then was his duty as such broker, to render accounts to the managing owner of the said ship of the various disbursements made by the plaintiff as such broker on account of the said ship; and that, while the plaintiff was so employed in the way of his said trade and business, and before the committing of the said grievances, the plaintiff knowingly, fraudulently, and dishonestly inserted in the accounts of the said ship so rendered by him, as having been paid by him to different persons on account of the said ship, to wit, to Mr. J. Thomas, to Stephenson & Co., to Mr. Hastie, to Mr. Lee, to Mr. Reynolds, to Mr. Surfas, to Mr. Loveland, to Mr. Mason, to Mr. M. Blake, to Mr. Trail, to Mr. Parnell, to Mr. Blythe, and to Mr. Frazer, much larger sums than the amounts actually and really paid, with intent to cheat and defraud the defendant, and the other part owners of the said ship, and to cause the defendant and the other part owners to believe that the *plaintiff had actually and really paid on account of the said ship the several sums of money inserted by him in the said accounts. [*272

The plaintiff took issue upon the first plea, and joined issue on the second.

By a judge's order made by consent on the 29th of August, 1856, *all matters in difference in the cause* were referred to an arbitrator,—*the costs of the cause, and also the costs of the order and of the reference and award, to abide the event of the award,*—the arbitrator to find for the plaintiff or the defendant respectively as he might think fit on each and every of the issues joined in the cause, to have all the powers of a judge at Nisi Prius as to certifying, amending pleadings and proceedings, or otherwise, and *to have power to direct how the verdict in the cause should be entered,* and also to direct what (if anything) should be done by either of the parties in reference to the subject-matter of the cause.

On the 4th of May, 1857, the arbitrator made his award, as follows:—

"Upon the first issue, on not guilty, I find for the plaintiff as to the second and fourth, and for the defendant as to the first and third counts of the declaration.

"Upon the second issue, arising out of a plea of justification to the second count, I find that so much of the plea as relates to the plaintiff and the accounts of the ship Treasure was proved, and that the rest of the plea was not proved. Being of opinion that the part proved is an answer to the count, I assess no damages for the plaintiff on that count.

"As to the fourth count, I assess the plaintiff's damages at 40*s.*, which

sum I order the defendant to pay to the plaintiff, or his attorney, Mr. Cooper, on demand.

"I do not think fit to exercise the power given me by the said order to direct anything to be done by either of the parties in reference to the subject-matter of the said cause."

*273] *Upon taxation of the costs, the master allowed the plaintiff the general costs in the cause, including *all the costs of the issue upon the plea of justification*, and declined to allow the defendant any part of the costs of that issue, upon the ground that the defendant's evidence as to the parts of the plea upon which he succeeded was applicable also to that part of the plea which the finding negatived, and that such finding in the negative of part of the plea was in effect a finding of an issue for the plaintiff within the 74th rule of Hilary Term, 2 W. 4, and the 81st section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76.

Honyman, in Hilary Term, 1858, moved for a rule to show cause why the master should not be at liberty to review his taxation. The event of the award,—that is, the event of the *whole* award,—not being in favour of either party, neither is entitled to costs; or, at all events, the defendant ought to be allowed the costs of that part of the plea of justification which the arbitrator has found for him. [COCKBURN, C. J.—The effect of the finding of the arbitrator, is, that the plaintiff had no cause of action, except on the fourth count.] In Gribble *v.* Buchanan, 18 C. B. 691 (E. C. L. R. vol. 86), it was held,—adopting the rule laid down in Russel on Awards, 2d edit. 380,—that, where by the order the costs of the reference and award are to abide the event of the award, and the event is partly in favour of the plaintiff and partly in favour of the defendant, no costs are payable on either side. It is true that that was a reference of a cause *and all matters in difference:* but the principle is the same. [COCKBURN, C. J.—It seems to me that the principle adopted in Gribble *v.* Buchanan is equally applicable in this case.]

Hannen showed cause in the first instance.—This is a reference of *all*

*274] *matters in difference in the cause* *only, and the costs of the cause, as well as of the reference and award, are to abide the event of the award: and the question is, whether the master was not right in taxing the costs precisely as he would have done if the result had been arrived at by the finding of a jury, instead of the award of an arbitrator. Where *all* the costs are made to depend upon the event of the award, the whole become taxable as costs in the cause: Wood *v.* O'Kelly, 9 East 436; Russell on Awards 380: and the parties are entitled to costs according to the finding upon the several issues. The Matlock Gas Light and Coke Company *v.* Peters, 6 Ellis & B. 215 (E. C. L. R. vol. 88), is very much in point. By an order of Nisi Prius, a cause and all matters in difference were referred to an arbitrator, who was empowered to direct a verdict for the plaintiffs or the defendant, or a nonsuit,—the costs of the action to abide the event of the award. The arbitrator directed that a verdict should stand for the plaintiffs, for substantial damages, which he adjudged to be due from the defendant to the plaintiffs, and that certain lamps, in respect of which the plaintiffs made a claim for damages in the declaration, should be delivered up to the defendant: and it was held that the plaintiffs were entitled to the costs of the action. Boodle *v.* Davies, 3 Ad. & E. 200 (E. C. L. R. vol. 30),

4 N. & M. 788, and Yates *v.* Knight, 2 N. C. 277 (E. C. L. R. vol. 29), 2 Scott 470, were cited. But Lord Campbell said: "Those cases are clearly distinguishable from the present. The submission here empowers the arbitrator to order a verdict or nonsuit; and the award expressly directs a verdict for the plaintiffs; and that, *as to the action*, is the event of the award."

Honyman, in support of the application.—By the order the parties seem to have dealt as if this were a reference of the cause and all matters in difference. In Boodle *v.* Davies, 3 Ad. & E. 300 (E. C. L. R. vol. 30), 4 N. & M. 788, a cause *and all matters in difference were referred; the arbitrator to have power to state how a [*275 certain passage, &c., should be enjoyed, and who should have the management thereof, and to abate illegal erections; the costs of the action, reference, and award to "abide the event of the said award." The action was in trespass; and the arbitrator found that the defendant had committed trespasses in respect of some of the matters complained of in the action; but he decided some matters in favour of the plaintiff, and some in favour of the defendant. He also awarded that the costs of the action, reference, and award should be paid by the defendant. But the court said,—"The costs of the action were to abide the event of the award. There has been no event of the award for this purpose. The arbitrator had no power to say anything of costs." Patteson, J., in that case, observes: "The form of the reference is singular. Where an action is depending, it is reasonable to provide that the costs shall abide the event; but, where all matters in difference are referred, it seems that, under such an order, as to costs, each party must pay his own, unless everything is found in favour of one." So, in Yates *v.* Knight, 2 N. C. 277 (E. C. L. R. vol. 29), 2 Scott 470, where, under a reference of an action and all matters in difference, by which the costs of the suit, and of the reference and award, were "to abide the event of the award," the arbitrator had directed that the suit should cease, each party giving a general release, and that the defendant should give up certain articles to the plaintiff, and the plaintiff pay a sum named to the defendant,—this court held that the event was such that each party must bear his own costs. Both these cases were cited in Gribble *v.* Buchanan, 18 C. B. 691 (E. C. L. R. vol. 86), and their principle acted upon. The Matlock Gas Company *v.* Peters, 6 Ellis & B. 215 (E. C. L. R. vol. 88), was also referred to in Gribble *v.* Buchanan, but without effect. [WILLES, J.—What is the *difference between [*276 the event of the cause, and the event of an award which disposes of the cause?] The event of the cause may be taken distributively: the event of the award must be the *entire* event. [COCKBURN, C. J.—According to your argument, if some little issue is not found in favour of the party who succeeds upon all the rest, he is to have no costs. I must confess I should have great difficulty in bringing my mind to such a conclusion.] There are several causes of complaint here, some of which only are sustained. What substantial distinction can there be between such a case and one where the arbitrator has found the event of the cause one way and that of the matters in difference the other? [WILLIAMS, J.—Where the reference is of the cause and all matters in difference, and the costs are to abide the event of the award, it means some general event: but why should that be so where the cause only is

referred? COCKBURN, C. J.—Is not this a new phraseology as applied to the costs of the cause? *Hannen.*—This form of submission appears not to be uncommon. WILLES, J.—It is, I think, unusual with reference to matters in difference *in the cause.*] The language of the submission will fairly bear the construction sought to be placed upon it. It is impossible to say how much of the costs may be attributable to the matters found one way, and how much to those found the other. Another question arises here, viz. whether the master was right in disallowing the defendant the expenses of the witnesses called in support of his justification in reference to the ships Orynthia and Baroness. [COCKBURN, C. J.—Your plea embraces three separate grounds of justification: you succeed as to one; and you say you are entitled to costs in respect of the other two, as to which you failed?] Yes. The defendant proved enough of his plea to entitle him to a verdict upon it. [COCKBURN, C. J. —It certainly seems monstrous that a defendant should be entitled *277] *to the costs of attempting to establish that which a jury or an arbitrator has found to be false. My brother Willes, however, informs me that there is a recent case in which the Court of Queen's Bench has so decided. WILLES, J.—The case I refer to is Biddulph *v.* Chamberlayne, 17 Q. B. 351 (E. C. L. R. vol. 79). It was an action for a libel, with a plea justifying as true part of the libel, which comprised several libellous allegations, the whole of which were put in issue by the general replication de injuriâ. On the trial, the learned judge asked the jury to find separately as to the truth of the several allegations justified. The jury found that some of the allegations were *not* true, and that others, forming an important part of the libel, *were* true. A general verdict having been entered for the plaintiff, a judge at chambers made an order that the master should not allow the plaintiff the costs of the witnesses called only to disprove that part of the plea which was found to be true; and, upon a motion to rescind that order, it was held by Lord Campbell, C. J., Patteson, J., and Coleridge, J. (dissentiente Erle, J.), that the order was improper, the issue being indivisible. That case is what is called the converse of this. Lord Campbell, in giving judgment, there says,—"The question raised is, whether, with respect to the allowance of costs, an issue can be considered distributive which cannot be divided on the record because it is taken on one entire plea. I feel great difficulty in seeing how it can be done. In all cases cited,(*a*) the issue might have been divided on the record, and a finding might have been entered on one part of it for the plaintiff, and on the *278] other for the *defendant: but where, as in the present case, the plaintiff is entitled to the verdict on the entire issue, it is difficult to see how, for the purpose of taxation of costs, we can distinguish between the several allegations in the one entire plea. That has never been done hitherto; and it would often have been done, but for the inconvenience of the course." Patteson, J., says,—"This question could not have arisen unless I had put specific questions to the jury as to the different allegations in the plea; for, if I had left the issue generally to the jury, and they had found a general verdict, it could not have been

(*a*) Prudhomme *v.* Fraser, 2 Ad. & E. 645 (E. C. L. R. vol. 29), 4 N. & M. 512, Welby *v.* Brown, 1 Exch. 770,† Williams *v.* The Great Western Railway Company, 8 M. & W. 856,† Daniel *v.* Barry, 4 Q. B. 59 (E. C. L. R. vol. 45), 3 Gale & D. 277, and Anderson *v.* Chapman, 5 M. & W. 483.†

known what allegations they thought disproved. Now, the questions were put by me quite alio intuitu; and I think the fact that such questions were put ought not to affect the costs. In this case, there is one single issue, *indivisible so far as regards the verdict.* It is contended that the issue may nevertheless be divisible as to costs. It is quite clear that it is not divisible for the purpose of giving the costs of those allegations which were disproved to the defendant; but it is urged that, though not divisible so as to give the defendant those costs, it may be so divisible as to deprive the plaintiff of them. I think the precise question has never before been raised, as the attempt has always been to give costs, not merely to deprive the other side of them: but I am of opinion that we ought not to establish the rule as asked for now." And Coleridge, J., adds,—"If an issue indivisible for the purpose of the verdict may be divided for the purpose of costs, I do not know where to stop; the party would have at least an equitable right in all cases to ask the judge to put the allegations separately, which would be very inconvenient." [COCKBURN, C. J.—I think Mr. *Hannen* should have an opportunity of considering this point a little. It certainly involves a very important principle. WILLES, J.—And also the section in the *Common Law Procedure Act, 1852, which applies to distributive issues,—15 & 16 Vict. c. 76, § 75.] [*279

COCKBURN, C. J.—As regards the first part of the motion, I am of opinion that there should be no rule. The order of reference provides that the costs of the cause, and also the costs of the order and of the reference and award, shall abide the event of the award. The common sense interpretation of that is, that the costs of the cause should abide the event of the award *with reference to the cause.* I cannot conceive that any other meaning can properly attach to those words even where the reference also involves matters in difference. It appears to have been held in Gribble *v.* Buchanan, 18 C. B. 691 (E. C. L. R. vol 86), that, where by the order the costs of the reference and award are to abide the event of the award, and the event is partly in favour of the plaintiff and partly in favour of the defendant, no costs are payable on either side. That may have proceeded upon the notion that the parties did not intend the decision of *the cause* to be the criterion. It is quite possible that the matters in difference dehors the cause may be as important as, or more so than, those which are in issue *in* the cause. But that observation does not seem to me to apply where the cause only is referred. I quite concur in the view expressed by Lord Campbell in The Matlock Gas Light and Coke Company *v.* Peters, 6 Ellis & B. 215 (E. C. L. R. vol. 88), that, where the reference is of the cause and all matters in difference, the costs of the action to abide the event of the award, and the arbitrator is to be at liberty to direct a verdict, and he does so, that, as to the action, is the event of the award,—the meaning of the words being, the event of the cause as decided by the award. Upon this principle, justice will be done between the parties: where the matters in difference in the cause arise on distinct issues, as the *arbitrator awards upon the issues, so the costs will follow. I see no reason why we should depart from that rule: on the contrary, [*280 I see every reason why we should adhere to it. Bowing, therefore, to the authorities referred to, I am not disposed to carry the doctrine further, or to apply it to a case which is not clearly within the rule.

WILLIAMS, J.—I am of the same opinion. There is no doubt that the case of Gribble *v.* Buchanan, 18 C. B. 691 (E. C. L. R. vol. 86), and the authorities upon which it is founded, have established a rule, that, where, by an order, the costs of the reference and award are to abide the event of the award, and the event is divided, neither party is entitled to costs. As a general rule, the event of the award must mean the *general* event of the award, and each party must pay his own costs, unless the general event is in favour of one. The question is, whether we are bound to put the same construction here, where the submission is of all matters in difference in the cause, and the costs of the cause, and also the costs of the order and of the reference and award, are to abide the event of the award. I am of opinion that we are not constrained so to do. As far as my experience goes, I believe it has been very usual to provide in the submission that the costs of the cause shall abide the event of the cause; and I see no reason for supposing that the parties had any intention here to vary it; and I think no reasonable doubt upon the subject can be entertained, when we find that it is expressly provided by the order that the arbitrator shall have power to direct how the verdict in the cause shall be entered.

WILLES, J., concurred.

*281] *Hannen*, on a subsequent day, resumed his argument.—*The case of Biddulph *v.* Chamberlayne, 17 Q. B. 351 (E. C. L. R. vol. 79), affords no guide for the decision of this case, assuming it to have been rightly decided, which may fairly admit of doubt. The present case, it is submitted, falls rather within the principle of Prudhomme *v.* Fraser, 2 Ad. & E. 645 (E. C. L. R. vol. 29), 4 N. & M. 512. There, a count in libel contained several innuendos connecting the different parts of the alleged libel with the plaintiff. The jury negatived some innuendos, and affirmed others; and a general verdict was taken for the plaintiff. The court refused a rule for a new trial, but held that the defendant was entitled to his costs as to so much of the declaration as charged libellous matter the innuendos respecting which had been negatived. Upon that case was founded the opinion of the dissentient judge (Erle, J.) in Biddulph *v.* Chamberlayne. "I should have thought," says that learned judge, "the principle of Prudhomme *v.* Fraser was a precedent for this order. The libel in the present case contained several libellous allegations, and was in effect several libels. The defendant pleads a plea justifying both the allegation that there was a nuisance, and those that the plaintiff had otherwise misbehaved himself. The plaintiff puts in issue the whole plea, which, I think, was in substance one plea to two causes of action. The judge had a right, if he thought proper, to ask the jury what their opinion was as to each allegation separately; and the jury had a right, if they pleased, to return a special verdict, finding as to each allegation separately; and, though perhaps in strictness they ought not to be directed to consider how much of the libellous matter was true, when estimating damages, I suppose there is no doubt the jury would do so in fact. Then, the issue being divisible for all these purposes, I should say, that, according to the principle of Prudhomme *v.* Fraser, the issue might be considered divisible for the

*282] purpose of taxation; *and that we might refuse to allow the plaintiff the costs of attempting to negative that part of the plea which was proved." By the 75th section of the Common Law Pro-

cedure Act, 1852, all pleas that are capable of being construed distributively are to be so taken, and, if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered. And s. 223 empowers the judges of the superior courts, or any eight or more of them, of whom the chiefs of each of the said courts shall be three, from time to time to make all such general rules and orders for the effectual execution of the act, and the intention and object thereof, and for fixing the costs to be allowed for and in respect of the matters therein contained, and the performance thereof, and *for apportioning the costs of issues*,(a) and for the purpose of enforcing uniformity of practice in the allowance of costs in the said courts, and of insuring as far as may be practicable an equal division of the business of taxation amongst the masters of the said courts, as in their judgment shall be necessary or proper, &c. Here the second plea is capable of being divided; and, in the absence of any general rule upon *the subject, it was for the master to consider what costs the defendant had been put to in establishing that part of the plea which the arbitrator found to be true. [*283

Honyman, contrà.—The plea presents three substantial defences,—1. as to the alleged fraudulent transaction respecting the chartering of the ship Orynthia,—2. as to the alleged fraud on the sale of shares in the ship Baroness,—3. as to the falsifying the accounts of the ship Treasure. The defendant made out his justification so far as it related to the last-mentioned vessel; but failed as to the other two. The master has not only disallowed all the defendant's expenses as to the Orynthia and the Baroness, but he has allowed the plaintiff *his* costs as to the Treasure. This, it is submitted, is clearly wrong: the issue on the justification having been found for the defendant, he was entitled to the whole costs it involved. Under the old system, if a plea of justification consisted of two facts, each of which would, when separately pleaded, amount to a good defence, the justification was sustained if one of those facts was found by the jury: Spilsbury *v.* Micklethwaite, 1 Taunt. 146; Baillie *v.* Kell, 4 N. C. 638 (E. C. L. R. vol. 33), 6 Scott 379. [WILLIAMS, J. —But for the case of Biddulph *v.* Chamberlayne, 17 Q. B. 351 (E. C. L. R. vol. 79), I must confess I should have thought the chain of reasoning complete.] Prudhomme *v.* Fraser, 2 Ad. & E. 645 (E. C. L. R. vol. 29), 4 N. & M. 512, is clearly distinguishable: the libel had several meanings, and the plea was not guilty only, and not, as here, an affirmative plea. The cases upon the subject of distributive pleas, with reference to the 75th section of the Common Law Procedure Act, will be found in Taylor on Evidence, 2d edit. Vol. II., §§ 221—223. That section, it is submitted, never was intended to apply to such a case as this, which is precisely within Biddulph *v.* Chamberlayne. The defendant has succeeded upon the issue on his second plea.

(a) These words were inserted in the Commons after the bill had been amended and sent down from the Lords.

The power thus conferred upon the judges has not for this purpose hitherto been exercised; neither has the power to make rules for the purpose of "insuring as far as may be practicable an equal division of the business of taxation amongst the masters of the said courts;" although both,—and especially the latter,—might be exercised with great advantage to the public.

*284] *WILLIAMS, J.—Before we pronounce any decision in this case, we will ascertain more particularly from the master the course he adopted on the taxation. Cur. adv. vult.

COCKBURN, C. J., now delivered the judgment of the court.

This was a rule obtained by the defendant, calling upon the plaintiff to show cause why the taxation of costs should not be reviewed.

The action was for slander. The declaration contained four counts. The defendant pleaded not guilty to all the counts, and, further, to the second count, a multifarious plea of justification, setting forth a series of statements of fact, any one of which would be a sufficient answer to that count. The plaintiff took issue upon the pleas.

The cause was referred to arbitration; and the arbitrator has found for the defendant upon the plea of not guilty to the first and third counts, as to which no question arises.

Upon the second count the finding is, upon not guilty, for the plaintiff, and, upon the plea of justification, that one of the statements in the plea, forming a sufficient answer to the count, is true, and that the other statements in the plea are untrue. The result is in favour of the defendant as to that plea, and he succeeds accordingly upon the second count.

Upon the fourth count, the finding is for the plaintiff, with 40*s.* damages.

The question before us is, how the costs of the issue upon the plea of justification ought to be taxed,—whether altogether for the plaintiff; or for the defendant as to the statement proved, and for the plaintiff as *285] to the residue, which the arbitrator has found not proved; or *for the defendant as to the part proved, and for neither party as to the residue; or altogether for the defendant.

The master has adopted the first of these courses, upon the ground that the defendant's evidence as to the parts of the plea upon which he succeeded was applicable also to that part of the plea which the finding negatived, and that such finding in the negative of part of the plea was in effect a finding of an issue for the plaintiff, within the statute and rule applicable to the subject. If this was so, the master was right in acting upon the settled practice, by which the party who is entitled to costs of the cause is entitled to costs of evidence applicable to any issue or issues found for him, though also applicable to an issue or issues found against him; and that the other party is entitled only to the costs of evidence *exclusively* applicable to anissue or issues upon which he has succeeded.

This rule of taxation is undoubtedly correct; and the question is, whether it was correctly applied to the facts. The rule of court upon this subject in force before the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), was that of Hilary Term, 2 W. 4, r. 74, that "No costs shall be allowed on taxation to a plaintiff upon any issue or issues upon which he has not succeeded; and the costs of all issues found for the defendant shall be deducted from the plaintiff's costs." And now, by the 81st section of the Common Law Procedure Act, 1852, it is provided that "the costs of any issue either of fact or law shall follow the finding or judgment upon such issue, and be adjudged to the successful party, whatever may be the result of the other issue or issues."

It appears, therefore, that the master was right, if there was an issue within the meaning of the act found for the plaintiff upon the plea of justification, to which issue the evidence for the defendant upon the

portion *of the plea found for him was in part applicable: and we are of opinion that there was not. [*286

The defendant might have divided the plea into as many distinct pleas as it contains defences. In that case, he would have had the costs of the defence upon which he succeeded. He, however, has pleaded all his defences in one plea. There is no substantial demerit in that. At the common law, duplicity must have been objected to by special demurrer. If not specially demurred to, a double plea was good, without the aid of any statute of jeofails or act allowing double pleading. A defendant at the common law had no costs of issues found for him, in any case where the plaintiff was entitled to the general costs of the cause. Now he has: but that cannot affect the question what is the issue upon the plea. Now that special demurrers are abolished, the remedy of a plaintiff who may be embarrassed by such a plea, is, to apply to a judge to strike it out or (perhaps) to order the defendant to divide it into several: but, if the plaintiff does not think proper to make that application, the consequence is, that the defendant has pleaded in one plea, without objection, several distinct and sufficient defences, any one of which being shown to be true, the plea is proved, and the defendant succeeds. In effect, therefore, the issue joined upon a double or multifarious plea, is, whether either of the defences set up therein is true. If either of them be true, the verdict upon that issue must be for the defendant. The jury may, undoubtedly, give a special verdict, finding one of the alleged defences for the defendant, and that the residue of the plea is untrue, referring the question whether the issue is proved to the court; and, if it were questionable whether the matter found to be true constituted a justification, that would be a proper course to take. But if, as here, the matter found to be true clearly constitutes a justification, *the latter part of such finding does not alter the effect of the former, [*287 which alone constitutes a sufficient defence, in whatever form the finding may be as to the residue of the plea. The issue is disposed of altogether in favour of the defendant.

Reliance was placed by the plaintiff's counsel upon the 75th section of the Common Law Procedure Act, 1852, as making the issue distributable. But that section is inapplicable, being intended to meet cases in which the verdict may be so distributed as to constitute an answer to the previous pleading, though only in part, that is, such an answer as might before the statute have been set up by a pleading expressly limited to part; in which cases injustice was done before the statute, by entering a verdict for the plaintiff or defendant upon the ground that the issue was in form indivisible, though upon the evidence a good defence or cause of action was made out in part. The present taxation, founded upon the assumption that an issue upon the plea of justification was found in favour of the plaintiff, must therefore be set aside.

The rule will, consequently, be absolute, upon that ground. But, as we have thus far only decided that the defendant is entitled to the costs of so much of the plea as was expressly found in his favour, the parties might be involved in needless expense unless we proceed to direct how the taxation is to take place with reference to the further question whether the plaintiff is to have his costs of the part of the plea expressly found to be untrue, and, if not, whether the defendant is to have his costs of such part, or only the costs of the part of the plea expressly

found to be true. This subject was discussed in Biddulph *v.* Chamberlayne, 17 Q. B. 351 (E. C. L. R. vol. 79), decided in the year 1851, upon the construction of the general rule of court already mentioned. In that case, the plaintiff complained of a libel containing several *288] *defamatory statements. The defendant pleaded a justification. The judge at the trial having asked the jury to find separately as to the truth of the several allegations justified, the jury found some to be untrue, and the others true. The plea being pleaded to more than was found true, and there being then no statute making it distributable, a general verdict was directed and found for the plaintiff; so that nothing appeared upon the record to show that the jury had found a portion of the matters alleged by the defendant to be true. The majority of the Court of Queen's Bench (dissentiente Erle, J.) held that the plaintiff was entitled to the costs of the whole plea; and set aside a judge's order depriving the plaintiff of the costs of witnesses called only to disprove the part of the plea which was found to be true. The reasons of the court fully appear in the judgment of Coleridge, J., who said,—"The safe course is, to limit the rule of Hilary Term, 2 W. 4, r. 74, to issues which may be found on the record. That, I think, is the meaning of the general rule made by all the courts for the purpose of rendering the practice uniform; and, if it is to be extended in the manner now sought, it ought to be done by a general rule of all the courts. That alone, I consider a sufficient reason for setting aside this order. But, further, I cannot but think, that, if, to advance what we supposed to be the justice of this case, we were to extend the rule as asked, we should lay down a most inconvenient rule of practice. If an issue indivisible for the purpose of the verdict may be divided for the purpose of costs, I do not know where to stop; the party would have at least an equitable right in all cases to ask the judge to put the allegations separately, which would be very inconvenient. But that is not all: it would follow that the master must, as it were, re-try the cause, so as to ascertain the materiality of each witness as to each allegation. I think it much *better to adhere to the rule than wrest it for *289] the supposed justice of the case. I say *supposed* justice; for, it must be remembered we have not complete knowledge of all the circumstances."

Since the Common Law Procedure Act of 1852, the question will probably not again arise in the same form as in the above case, because, under similar circumstances, the defendant would now, by force of the 75th section, be entitled to a verdict as to the part of the plea which was found to be true: but the case is still in point, where, as in the present case, there is a general denial of a multifarious pleading, which, for the reasons already given, cannot be distributed under s. 75, and a general finding by the jury in the affirmative of the issue so raised. Therefore, if there had been in Biddulph *v.* Chamberlayne a special verdict to the effect of the answers of the jury to the judge, that case would have been in point. And that circumstance would probably have been considered unimportant by the majority of the court. Therefore, if our decision could be taken to a court of error, we should feel bound by that case as a precedent. Doubting, however, as we do, whether the record could be framed so as to raise the point, and seeing that it is one of a class which rarely finds its way into a court of error, we

think we ought to deal with the case as one in which there is no appeal, and act upon our own judgment, if, upon reflection, we are unable to agree to the decision of the majority in Biddulph *v.* Chamberlayne. We proceed, therefore, to consider the points there decided.

First, it was there assumed throughout that the party against whom the issue was found was not entitled to the costs of the averments found in his favour at the trial to be untrue. This, we think, was right, upon the ground already stated, that costs, apart from costs in the cause, are only given by the rule of court and the statute to a party succeeding upon an issue: and the *defendant in that case, like the plaintiff in this, had not succeeded upon any issue upon the plea of justification. [*290

The decision in that case, that the plaintiff was entitled to the costs of witnesses called to contradict what was found to be true, rests upon different grounds, stated at large in the judgment of Coleridge, J., already set forth. One at least of those grounds does not exist in the present case, viz., the inconvenience that "the master must, as it were, re-try every cause, so as to ascertain the materiality of each witness as to each allegation." That would be unnecessary here; for, the finding of the arbitrator is not general, like that of the jury in Biddulph *v.* Chamberlayne, but special, that the plea is as to part true, and as to the rest untrue.

It was contended, for the defendant, that the finding of the arbitrator, so far as it negatived part of the plea, was immaterial: but this argument ought not to prevail. The arbitrator was put, by consent, in the place of a judge and jury; and, if the cause had been tried in the ordinary way, it would have been competent for the jury to find specially in the form of the present finding, every word of which would have been part of the verdict, and must have been considered by the court, if called upon so to do, before pronouncing judgment. A formal reference of the question to the court was unnecessary, because the arbitrator is put in the place of the court as well as of the jury. Treating, therefore, that finding of the arbitrator as an authorized act, the master has here the means of at once determining the question which the general form of the finding left open in Biddulph *v.* Chamberlayne.

But we are prepared to go further; for, we should be sorry to admit it possible that there is any imperative rule of law or inveterate practice, by which we are compelled to order that the expense of unsuccessfully attempting to prove falsehoods, which we know by the *information of the judge to have been found false by the jury, must nevertheless be paid for by the party who so far had truth on his side. [*291 We apprehend that we may, and if we may we ought, to prevent our proceedings from being abused and perverted; and that we ought not to abstain from doing so in a case where the truth appears, because there may arise many others in which we cannot arrive at it. We apprehend that the court is bound not to allow a successful party all the expense he may have thought proper to incur, where we can see that part of it has been needless. If a party were to insist upon calling fifty witnesses to prove a notorious fact formally involved in a disputed issue, we may doubt whether the judge could lawfully reject the evidence of any one of them; but we cannot doubt that the master would not allow, and that the court would uphold the master in not allowing, the expenses

of them all. Quite independent of statute and rule, a discretion ought to be, and is in practice, exercised as to the amount of costs; and useless expenditure ought to be, and is in practice, disallowed. The master ought to look to the finding upon the issue, when there is nothing else in the proceedings to guide his discretion. But where, as here, there is matter ascertained in the cause,—whether appearing upon the face of the proceedings, or established by the statement of the judge founded upon his judicial knowledge of the facts,—whereby the master is satisfied that witnesses called by the successful party have been wholly useless, and their evidence as completely thrown away as if they had sworn to a truism or an irrelevant fact, he ought to disallow the expenses of such evidence, as at least unnecessary. That is so in the present case. The costs exclusively applicable to the part of the plea found to be untrue ought therefore not to be allowed to the defendant.

*292] *It follows that the rule to review the taxation ought to be absolute,—with a direction to the master to allow the plaintiff no costs of any part of the plea of justification, and the defendant's costs only of the part of that plea expressly found to be true, including costs of evidence applicable to such part, though also applicable to the residue of the plea, but not costs of any evidence applicable only to that part of the plea which was found to be untrue. Rule absolute.

MONTAGUE v. HARRISON. *Nov.* 17.

A person attending *a police court* as prosecutor or witness on a charge there pending, is privileged from arrest on civil process,—even though he is not attending under compulsion.

Atkinson, Serjt., on a former day in this term, obtained a rule to show cause why the defendant should not be discharged out of custody as to his arrest under a ca. sa. in this cause. The affidavits upon which the motion was founded, stated, that, on the 4th of August last, the defendant was in attendance at the Mary-le-bone police-court, before Mr. Broughton, the sitting-magistrate, as a prosecutor and witness against certain persons named Morgan, Passmore, and Hayter, who had been remanded on a charge of felony, and that the further hearing of the prosecution was adjourned to the 6th; that, on leaving the presence of the magistrate, and within the precincts of the said police-court, a number of persons (amongst whom were the accused) attacked the defendant with violence, tore his clothes, pulled him out of the court-house, and dragged him into the street, and there forced him into a cab, and conveyed him to prison under arrest on a ca. sa. for 32*l.* 4*s.* 2*d.* at

*293] the suit of the plaintiff; and that the *defendant was a material and necessary witness (and afterwards brought up by habeas), and was bound over to prosecute and give his evidence at the trial.

A similar application had previously been made to Channell, B., at Chambers, who declined to interfere, inasmuch as no authority precisely in point had been adduced before him.

Byles, Serjt., now showed cause, upon affidavits stating that the arrest was not made until the defendant had got into the street, and denying all complicity on the part of the plaintiff and the officers in the attack

alleged to have been made upon the defendant; and further stating that the defendant was not bound over until two days after the arrest. The privilege of a person from arrest eundo, morando, et redeundo, is the privilege of the court, and it is discretionary with the court to allow it or not as will best advance the interests of justice: per De Grey, C. J., in Cameron *v.* Lightfoot, 2 W. Bl. 1190. And this is confirmed by the judgment of the court of error in Magnay *v.* Burt, 5 Q. B. 381, 393 (E. C. L. R. vol. 48), where it is said: "The broad ground is, that the privilege the breach of which is the subject of complaint, is not to be considered, as it was accurately laid down by Lord Chief Justice De Grey in the case of Cameron *v.* Lightfoot, to be the privilege of the person attending the court, but of the court which he attends; and therefore the allowing or not allowing the privilege is discretionary; and it has been disallowed in collusive actions, and in vexatious ones, as in the Anonymous case in 11 Mod. 79, or where the party attends as a volunteer, and not upon process." The matter recently underwent considerable discussion in the Court of Queen's Bench, in a case of Ex parte Cobbett, 26 L. J. Q. B. 293, where it was held that a voluntary prosecutor,—as, a common informer,—is not privileged. [COCKBURN, C. J.—*The question is whether a party attending to prosecute and give evidence upon a charge pending before a police-magistrate, is entitled to the same privilege as a party attending before a court of justice. If it were not so, a man who was in peril of arrest never could perform his public duty.] The duty of prosecuting a felon is one of imperfect obligation, the breach of which is followed by no legal consequences: see the observations of Maule, J., in Ward *v.* Lloyd, 7 Scott, N. R. 507. [WILLES, J.—Is he to wait for a Crown-Office summons?] Bail attending to justify in a superior court are privileged: Meekins *v.* Smith, 1 H. Bl. 636. Gould, J., there referred to the Year Book, 11 Ed. 4, fo. 3, where it is said by Choke, J., that a "mainpernor" shall have the privilege of the court. In Ex parte King, 7 Ves. 312, it was held that a creditor attending before commissioners of bankruptcy (whether under a summons or not), to prove a debt, is privileged. [WILLES, J.—There the privilege is the creature of the statute.] In Anonymous, 1 Dowl. P. C. 157, it was held that a defendant, when discharged from legal custody, has no privilege from arrest in returning home. In Jacobs *v.* Jacobs, 3 Dowl. P. C. 675, a defendant who had been wrongfully arrested upon a Sunday, on a charge of forgery, without any warrant, was held to be properly arrested upon civil process as he was leaving the police-office after he had been ordered by the magistrate to be discharged. In Anonymous, 2 Salk. 544, "H. came to confess an indictment, and the court held that he had no privilege eundo et redeundo, because there was no process against him." [COCKBURN, C. J.—That is a very unsatisfactory report.] Anonymous, 11 Mod. 79, is a little more to the purpose,—"When a person complains to this court (B. R.) of a misdemeanor, and it is adjudged that his complaint is vexatious, this court will not allow the privilege of protecting him returning." In *Goodwin *v.* Lordon, 1 Ad. & E. 378 (E. C. L. R. vol. 28), 3 N. & M. 879, 2 Dowl. P. C. 504, a defendant who had been in custody on a charge of felony, and was acquitted and discharged, was held not to be privileged from arrest on his return home,—unless it was clearly shown that his apprehension on the criminal

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charge was a contrivance to get him into custody in the civil suit. [COCKBURN, C. J.—The magistrate was seised of the proceeding. The prisoners were under remand. The defendant was a material and necessary witness, and his non-attendance would have been highly culpable.] This certainly is a case of the first impression. There is no instance of such a privilege ever having been allowed or claimed. If a prosecutor is privileged, the privilege must equally extend to all who attend as witnesses. [WILLES, J.—It seems that a party attending as prosecutor or witness at Quarter Sessions, would be privileged from arrest: Com. Dig. *Privilege* (A.): but not where he is the party prosecuted. This was decided by the Court of Queen's Bench in Hare *v.* Hyde, 20 Law J., Q. B. 185. There, the defendant, immediately after his acquittal and discharge on a trial at the Quarter Sessions for embezzlement, and whilst he remained in court, was arrested under a writ of ca. sa.: and the court refused to discharge him. Lord Campbell there says: "I am of opinion that the defendant had no privilege from this arrest, upon the ground of his being tried and acquitted and still present in court when arrested. After having been acquitted, he remained in court like any other of the circumstances. The cases cited (*a*) show clearly, that, by the law in England, the defendant would have had no privilege whilst *296] returning home from the court, *and, if so, he cannot have any such privilege by remaining as a spectator in the court. In some cases, circumstances might make it proper to interfere and discharge a person arrested in a court of justice; but, in this case, the question is whether we will summarily discharge a party from custody simply because he has been arrested in a court of justice: and I think there is no ground for our interference. We are not to vindicate the privilege of the court where the arrest took place, but only to see whether the defendant was entitled to any personal privilege from arrest under the process of this court: and I think he was not. I have the most sincere respect for the opinions expressed by the Irish judges in the cases cited; (*b*) but they are contrary to the decisions of the courts here, and with the latter my opinion concurs."] There is no instance of this privilege having ever been extended to one attending as prosecutor or witness before a police-magistrate: and, at all events, it must be limited to persons attending as witnesses under compulsion of some legal process. There being no precedent for the privilege here claimed, and its allowance being so likely to lead to abuse, the court will pause before they entertain the application.

Atkinson, Serjt. (with whom was *Lush*, Q. C.), in support of the rule.—The grounds of privilege are well stated by Lord Denman, in Newton *v.* Constable, 2 Q. B. 157 (E. C. L. R. vol. 42), 1 Gale & D. 408, 9 Dowl. P. C. 933. To disentitle the present defendant to his discharge, it must be shown, that, in attending at the police court, he *297] was a mere volunteer,—as in Ex parte Cobbett, 26 Law J., *Q. B. 293,—that he was under no legal obligation to appear and give evidence. It appears that he had been in attendance on the 4th of August, and that his presence was required on the 6th, when he was

(*a*) Anonymous, 1 Dowl. P. C. 157, Jacobs *v.* Jacobs, 3 Dowl. P. C. 675, and Goodwin *v.* Lordon, 1 Ad. & E. 378 (E. C. L. R. vol. 28), 3 N. & M. 879, 2 Dowl. P. C. 504.

(*b*) Callans *v.* Sherry, 1 Alcock & Nap. 125, The King *v.* M'Loughlin, 1 Alcock & Nap. 130, and Kelly *v.* Barnwell, and Cooke *v.* Ale, 6 Irish Law Rep. 94.

brought up under a writ of habeas corpus ad testificandum, and was bound over to prosecute and give evidence against the accused. The circumstance of his not having been bound over before the arrest makes no difference; he was equally under an obligation, legal as well as moral, to give his attendance. [WILLES, J.—It is not usual for magistrates to issue summonses for the attendance of witnesses, unless there is reason to believe that they will not attend voluntarily.] Meekins *v.* Smith, 1 H. Bl. 636, and the cases there cited, are authorities to sustain this application. And in the case of In re M'Intosh, 3 Law Times 116, a witness voluntarily attending before an arbitrator was held to be privileged from arrest eundo, morando, et redeundo.

COCKBURN, C. J.—I cannot entertain a shadow of doubt that the rule for discharging the defendant out of custody should be made absolute. It is unnecessary upon this occasion to decide whether or not a party proceeding in the first instance to a police-court for the purpose of putting the criminal law in motion would be entitled to be discharged from arrest on civil process, because here the matter may be disposed of on a narrower ground. It appears that the defendant had gone before a magistrate at the Mary-le-bone police-court, and obtained a warrant against three individuals upon a charge of felony; that the accused were brought before the magistrate and examined, and remanded to a future day; that the defendant attended before the magistrate on the last-mentioned day as prosecutor and witness; that the accused were again remanded; and that, immediately on his leaving the police-court, the *defendant was arrested on a ca. sa. at the suit of the present plaintiff. Now, it is clear that the magistrate might, if he had [*298 entertained any doubt as to the defendant's willingness to attend on the adjourned day, have bound him over to appear, or caused him to be served with a summons for that purpose; and the defendant's legal obigation to appear would have been unquestionable: and I do not see that it can make any difference that the defendant was willing to attend without that ceremony. I have no doubt that a police-court where charges are initiated and investigated before a magistrate, is a court within the rule as to the privilege of witnesses. Therefore, the defendant having been arrested whilst leaving the court where he had been attending to give evidence in a matter pending before the court, is entitled to be discharged. We cannot now go into the collateral question whether or not the prosecution was well founded. It may, however, be observed that the magistrate so far thought it a fit case for investigation, as to remand the prisoners twice, and ultimately to commit them for trial. We must take it, therefore, that it was not a collusive proceeding. The protection must be allowed.

WILLIAMS, J.—I am entirely of the same opinion. The case admits of no reasonable doubt, when the facts are closely looked at. The magistrate thought the charge one fit for investigation, and the defendant was in attendance in obedience to his request: there can be no doubt, therefore, as to the privilege. It clearly can make no difference that the magistrate did not think it necessary to issue a summons to compel the defendant's attendance. There is no case precisely in point; but all the principles upon which the cases proceed are applicable here. The privilege is not that of the witness, but of the court, for the purpose of insuring a due administration of justice.

*299] *CROWDER, J.—I am of the same opinion. There was a matter pending before the magistrate at which the defendant was attending and expected to attend again on a future day to prosecute and give evidence. That the defendant did not attend by virtue of a summons, clearly makes no difference. It is not usual, as my Brother Willes has observed, to summon witnesses in such cases, where no doubt exists as to their willingness to attend. There is nothing to differ this from the ordinary case of a witness attending court in a proceeding civil or criminal. Cobbett's Case is altogether distinguishable: there, the applicant was not in the course of performing a public duty; he was, as has been said, a mere volunteer.

WILLES, J.—I am entirely of the same opinion. The principle upon which the privilege now in question rests is this,—that a suitor who has obtained a judgment in a civil action, cannot use the process of the court for the purpose of withdrawing from another court a witness or other person without whose presence full justice cannot be done. This principle applies to every court of justice, criminal as well as civil: and it seems to have been applied to the case of bail so long ago as the 11th of Edw. 4,—see Meekins *v.* Smith, 1 H. Bl. 636. It has been suggested that the privilege must at all events be limited to persons attending under compulsion of process. There clearly is no foundation for that. To hold that a witness is protected only where he attends in obedience to process, would be to say that process must be sued out in every case to enforce the attendance of witnesses; whereas, in practice, it is perfectly well known that witnesses frequently attend without being subpœnaed. And this is more especially the case in proceedings like that now in qestion. The 16th section of the 11 & 12 Vict. c. 42, provides *300] that a *magistrate may issue his summons to enforce the attendance of a witness, where it is made to appear that his or her evidence is material, and there is reason to believe that he or she will not attend without such summons. It appears, therefore, that it is not only the ordinary course not to issue summonses to compel the attendance of witnesses upon these occasions, where they are willing to attend without: but it is in the due and regular course of law that the attendance of witnesses shall be given without any compulsory process. Here, the defendant was attending in the due and regular course of justice applicable to proceedings in such courts: and I am clearly of opinion that his case falls within the rule. Rule absolute.

In Ex parte Daniel McNeil, 6 Mass. 264, it was held that a witness voluntarily attending on the trial of a case without subpœna, was not privileged from arrest on civil process; and the same decision was made in Rogers *v.* Bullock, 2 Penington, 516, under the words of a statute in New Jersey. But the contrary has been held in other states: United States *v.* Edme, 9 Serg. & R. 147; Norris *v.* Beach, 2 Johns. 294; Dixon *v.* Ely, 4 Edw. Ch. 557. The question whether the prosecutor in a criminal case is privileged, does not appear to have been determined in this country. In Bowes *v.* Tuckerman, 7 Johnson, 538, however, a person under recognisance to appear at a court of General Sessions, while attending the court, was decided so to be. But, in Pennsylvania, it seems to be held that the privilege from arrest is confined to civil proceedings, and does not extend to a defendant attending court on a criminal

charge, unless where that is only a contrivance to get him into custody in the other suit: Commonwealth *v.* Daniels, 6 Penna. L. Journ. 330; Addick *v.* Bush, Philad. Rep. 7. So in Lucas *v.* Albee, 1 Denio, 666, a defendant, after having been tried and convicted of an assault and battery, was held not privileged *redeundo* from an arrest in a civil suit for the same cause.

BALFOUR and Another *v.* The Official Manager of THE SEA FIRE LIFE ASSURANCE COMPANY. *Nov.* 7.

Forbearance of a debt due from a third person is a sufficient consideration for the giving of a bill or note.

To an action by endorsees against the drawers of a bill of exchange, the court refused to allow the defendants to plead, by way of equitable defence, that a debt was due to the plaintiffs from a public company which had professed to assign its business and obligations to the defendants, that the bill was afterwards given by the defendants in consideration of that debt, and upon the supposition that the assignment was legal and valid, whereas it proved to be illegal and void,—the proposed plea affording no defence to the action, either legal or equitable.

THIS was an action on a bill of exchange for 500*l.*, drawn by The Sea Fire Life Assurance Company, at sixty days' date, upon their cashier,—in the same form as the instruments in the cases of Ellison *v.* Collingridge, 9 C. B. 570 (E. C. L. R. vol. 67), and Allen *v.* The Sea Fire Life Assurance Company, 9 C. B. 574,—and endorsed to the plaintiff.

Garth, on a former day in this term, obtained a rule calling upon the plaintiffs to show cause why the *defendants should not be at liberty to plead, in addition to a denial of the making of the bill, [*301 a plea, upon equitable grounds, to the following effect,—that, before the making of the bill, a debt was due to the plaintiffs from a company called The Port of London Sea Fire and Life Assurance Company, which company had, in October, 1849 (before the date of the bill declared on), professed to assign all their business and obligations to the defendants; that the bill was afterwards given by the defendants upon the mistaken supposition on the part of the plaintiffs as well as of the defendants that the said assignment was valid, and for no other reason whatever; whereas, in truth, the said assignment was a nullity, and the defendants were never under any obligation whatever to satisfy the said debt.

Phipson and *G. Taylor* now showed cause.—The proposed plea affords no defence to the action. At *law*, it clearly would be no defence. The defendants, at the time they gave the bill in question, had entered into an agreement whereby they professed to take upon themselves all the obligations of another company; and they gave the bill under an impression that they were bound to give it to satisfy a debt due to the plaintiffs from that other company. That was a perfectly good consideration. It is precisely like the case of Sowerby *v.* Butcher, 2 C. & M. 368.† There, the defendant drew in favour of the plaintiff a bill which his brother ought to have drawn; and, though it was contended, that, as between the plaintiff and the defendant, there was no consideration for the drawing, the court held, that, as the defendant had chosen

to draw a bill under circumstances in which the plaintiff had a right to have a bill, the defendant was bound: and Bayley, B., said: "He (the
*302] defendant) might have given a bill or not, as he thought fit, and he might have given a bill stating *on the face of it that he drew it for Robert Butcher (his brother); and, if he had stated that he drew it as agent, and had asked for a written acknowledgment that he should only be held liable as agent, he would have acted the part of a prudent man, and got rid of the personal obligation to which, by signing generally, a party is liable. But it is said there was no consideration for the defendant's binding himself personally. That is not necessary. He professes to bind himself personally: and the answer to the objection that there was no consideration, is, that the plaintiff had a right to have a bill which should bind somebody." . By the giving of the bill, the plaintiffs' remedy has been suspended, and the third party has had the benefit of that. Then, it is said that the proposed plea shows a defence upon equitable grounds. That clearly is not so. This is not like a case where a party has been induced to give the bill by fraud or misrepresentation: nor is it a case for an application to a court of equity to reform the contract. The defendant has no claim in equity to be relieved from the performance of his contract merely because it has been decided by the House of Lords that the amalgamation of these two companies, and consequently the agreement upon the faith of which the defendants drew the bill in question, was invalid. The plaintiffs have sustained a detriment by the suspension of their remedy and the insolvency of the other company. The proposed plea was disallowed by Cresswell, J., at chambers, because there was no equity in it.

Garth, in support of the rule.—The plea proposed to be pleaded discloses matter which clearly amounts to an equitable defence. The moment after the defendants had given the bill in question, if the plaintiffs had discovered that the assignment of the business by the Port of
*303] London Assurance Company was invalid, they might *have gone to their debtors and insisted upon being paid the amount of their claim, on the ground of the bill having been given under a mistake. Forbearance at his request during the currency of the bill, is the only consideration for the bill from a third party: Nelson *v.* Serle, 4 M. & W. 795.† There, in a declaration against the defendant as maker of a promissory note, he pleaded that one J. W., before and at the time of his death, was indebted to the plaintiff for goods sold, and that the amount was due at the time of the making of the note; that the plaintiff, after J. W.'s death, applied to the defendant for payment, and the defendant, at the plaintiff's request, for and in respect of the debt so remaining due to the plaintiff, and for no other consideration, made the note and delivered it to the plaintiff; and that J. W. died intestate, and no administration was granted, and there was no executor of his estate, nor any person liable for the debt; and that there never was any consideration for the making of the note except as aforesaid: and it was held by the Exchequer Chamber,—reversing the judgment of the Court of Exchequer,—that this was a good plea. [COCKBURN, C. J.—That is a totally different point.] In Byles on Bills, 7th edit. 109, it is said that "a debt due from a third person is a good consideration for a note payable at a future day; and so is a debt due from the defendant and a

third person."(a) "At least," adds the learned author in a note, "if the note be payable at a future day, for then the note amounts to an agreement to give *time to the original debtor, and that indulgence to him is a consideration to the maker. Secus, if the original debtor is dead, and has no representative: Nelson *v.* Serle, 4 M. & W. 795,† reversing Serle *v.* Waterworth, 4 M. & W. 9,† 9 Dowl. P. C. 684. But, if the note be payable immediately, it is conceived that the pre-existing debt of a stranger could not be a consideration, unless credit had been given to the original debtor at the maker's request. Crofts *v.* Beale, 11 C. B. 172, acc." Here, the only consideration there could be, was, the plaintiffs' forbearance to sue the original debtors: but, the bill having been given under a mistake, they were not bound to wait the sixty days. [WILLES, J.—Suppose A. supplies goods to B., and, for the convenience of the parties, it is agreed that he shall draw for the amount upon C., who is in the habit of receiving consignments from B., and therefore accepts,—both B. and C. being under the impression that the latter has or will have funds of the former's to meet the bill at maturity,—but it turns out that that expectation is fallacious; would that afford any equitable defence to C. to an action by A. upon the bill?] Clearly not: but that is very foreign to the case now before the court, which is one of mutual mistake. [COCKBURN, C. J.—Forbearance or delay being the consideration for the bill, what is it to the plaintiffs that the defendants have mistaken their position with relation to the company whose rights and liabilities they had consented to take upon themselves?] The bill would never have been given, but for the mistake: there was nothing binding the plaintiffs to forbear. [COCKBURN, C. J.—Suppose A. gives out to the world that he has taken B.'s business, and will liquidate all demands against him; and a creditor of B. comes and asks for payment of a debt, and agrees to take A.'s acceptance for it; and, during the currency of the bill, *A. discovers that B. has cheated him on the sale of his business,—would that be any answer to the creditor to whom the bill was given, and who has been induced to forbear?] The present case is put upon the ground of mutual error in the original transaction. [WILLES, J.—The rule is, that, in the case of a mutual mistake, each party must bear his own share of the consequences of the error, unless it be a mistake in the very contract which is sought to be enforced. Have you any authority to show that equity will reform a contract for some collateral mistake?] In Spence's Equitable Jurisprudence, p. 635, it is said, upon the authority of Brooke, "Conscience and Subpœna," pl. 4, who vouches the Year Book, 37 H. 6, fo. 13,—"The following case comes very near to relief in respect of mutual ignorance of law, both parties having, from such ignorance, made a mistake as to the materia of the thing sold. The plaintiff had purchased from the defendant certain debts that were due to him, and he gave the vendee a bond for the price. The plaintiff afterwards filed a bill to be relieved from the bond, on the ground that nothing passed to him by the assignment of the debts, they being choses in action, not assignable in law.

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(a) Citing Popplewell *v.* Wilson, 1 Stra. 264, Coombs *v.* Ingram, 4 D. & R. 211 (E. C. L. R. vol. 16), Sowerby *v.* Butcher, 2 C. & M. 368,† 4 Tyrwh. 320, Garnet *v.* Clarke, 11 Mod. 226, Ridout *v.* Bristow, 1 C. & J. 231,† 1 Tyrwh. 84, Wilders *v.* Stevens, 15 M. & W. 208:† and see Lechmere *v.* Fletcher, 1 C. & M. 623,† Baker *v.* Walker, 14 M. & W. 465,† Walton *v.* Mascall, 13 M. & W. 452,† Cook *v.* Long, Car. & Marsh. 510.†

The Chancellor, with the concurrence of the justices of both benches, whom he called to his assistance, decided that the bond should be delivered up, as given without consideration, 'pur ceo que le plaintiff ne poet aver quid pro quo;' and the defendant, on refusal, was sent to the Fleet." [COCKBURN, C. J.—There is no mistake here as to the consideration, as between the plaintiffs and the defendants. WILLES, J.—The case cited from Brooke is wrong for two reasons,—first, that no consideration at all is necessary for a bond,—secondly, that now debts may be the subject of assignment.]

*306] COCKBURN, C. J.—I am clearly of opinion that the *proposed plea ought not to be allowed. It seems to me to be a very plain and simple case. The plaintiffs had a claim of 500*l.* against The Port of London Sea Fire and Life Assurance Company. That company was supposed to be amalgamated with another called The Sea Fire Life Assurance Company, the present defendants; but it turned out that the steps taken for the purpose of effecting such amalgamation were insufficient with reference to the constitution of the company. In the mean time, however, and whilst the two companies believed themselves to have been duly and properly amalgamated, the plaintiff, in satisfaction of their claim against The Port of London Sea Fire and Life Assurance Company, agreed to take a security from the present defendants, and to forbear their claim against the former company. As between the two companies, it appears afterwards that the supposed amalgamation was a mistake, and that there was a failure of consideration for the defendants' taking upon themselves this liability. But that is nothing to the plaintiffs, unless it is shown that they have done something to contribute to the error. It does not appear that they have. But, in the full belief of the validity of the transaction, they take the bill, and forbear during its currency to press their claim. That forbearance at the defendants' request was clearly a good consideration for the giving of the bill; and there is no ground, either in law or equity, or in common justice, why they should not have their remedy against the defendants. The rule must be discharged.

WILLIAMS, J.—I am entirely of the same opinion. It is a fallacy to say that there has been any mistake about this contract. The defendants intended to give the bill, and they did give it, for a good and valuable

*307] consideration, viz., the forbearance of a debt due from *third parties to the plaintiffs. The mistake, as it is called, was simply this,—the defendants' motive for giving their acceptance was based upon a mistaken state of things. That is their misfortune. But it certainly affords no valid ground for holding that they are not liable upon their contract.

CROWDER, J.—I also think that the proposed plea would be no defence to the action, either legal or equitable. The whole argument on the part of the defendants proceeds upon the supposition that the contract as between the plaintiffs and the defendants was founded on a mistake. Now, the contract between the plaintiffs and the defendants was merely the giving of a bill by the latter in discharge of a debt due from third parties to the former, the consideration being the forbearance of the plaintiffs during the currency of the bill. The only mistake was, that the defendants erroneously supposed that the rights and obligations of those third parties had been legally and validly assigned to them. What

answer can that be to the plaintiffs' claim? No case has been cited to show that that would, in a court of equity, invalidate the plaintiffs' right to sue upon the bill. It is said that the only consideration for the giving of the bill is forbearance; and that the plaintiffs, as soon as they discovered the mistake which had been committed, might have repudiated the transaction, and sued the Port of London Sea Fire and Life Assurance Company. That, however, is assuming the whole question. There is no mistake as to the defendants' intention to give the bill, or as to the plaintiffs' forbearance from suing the other company. The case in no degree differs from the ordinary one where a party gives a bill for the debt of a third person, upon the faith of certain property having passed to him from such third person, and it afterwards turns out to be a mistake. It would *not alter the case at all that the plaintiff was [*308
under the same misapprehension.

WILLES, J.—I am of the same opinion. With regard to the authority cited from Brooke's Abridgment, I should have thought a much better authority might have been found for the proposition that a court of equity would prevent a party from suing upon a security the consideration for which had failed. The court there seem to have considered that there could not be an assignment of a debt. That doctrine has, as every one must know, been long since exploded, certainly so long since as the year 1791, and probably two hundred years before,—as appears from Master *v.* Miller, 4 T. R. 340, where Buller, J., says: "It is laid down in our old books, that, for avoiding maintenance, a chose in action cannot be assigned or granted over to another: Co. Litt. 214 a, 266 a; 2 Roll. 45, l. 40. The good sense of that rule seems to me to be very questionable; and in early as well as modern times it has been so explained away that it remains at most only an objection to the *form* of the action in any case." However, taking the case in Brooke to be an authority, it is only an authority for this, that a bond will be relieved against if it be shown that the consideration has failed. But, has the consideration for the giving of this bill failed? The plaintiffs have abstained from bringing an action against The Port of London Sea Fire and Life Assurance Company for the debt due from them during the time the bill was running. It is said, that, besides the forbearance, there is also the consideration of the contract under which the defendants thought themselves bound to pay all the obligations of The Port of London Sea Fire and Life Assurance Company. That, no doubt, was the defendants' motive for giving the bill; but it was no part of the consideration as between the *plaintiffs and the defendants. But then it is said that the [*309
defendants acted under a mistake. I think there was no mistake. The defendants intended to give this bill. There was a mistake as to the effect of the amalgamation. But the plaintiffs were no parties to that contract. And there was no misrepresentation. The proposed plea presents no shade of defence. The rule must be discharged,—the plaintiffs' costs to be costs in the cause.

Rule discharged accordingly.

WEAVER, Appellant, JOULE and Others, Respondents. *Nov.* 18.

In a case stated by a county court judge, upon an interpleader summons, for the opinion of this court, after setting out the facts under which a bill of sale had been given to secure a past debt and a contemporaneous advance, and finding that the transaction was bonâ fide,—the question submitted was, "whether the bill of sale was void as against the execution-creditors (the respondents), seizing after the first instalment secured by the bill of sale became due, and whilst the debtor was allowed to remain in possession, and with his name over the door as it had been before,"—Held, that, there being nothing to show that the deed was fraudulent, the appellant was entitled to judgment.

The respondents entered a plaint in the county court of Staffordshire at Wolverhampton, on the 16th of October, 1856, against one Samuel Blainey, then an innkeeper at Tettenhall, near Wolverhampton, to recover a balance of account for goods sold, amounting to 16*l.* 12*s.*, and the summons was served on the said Samuel Blainey on the 22d of October, 1856. The plaint was heard on the 3d of November, 1856, when Blainey was ordered to pay the said sum of 16*l.* 12*s.*, together
*310] with costs, by instalments of 3*l.* 3*s.* 2*d.* on the 17th of *November, 1856, and 2*l.* a month afterwards. The first instalment not having been paid on the 17th of November, 1856, an execution was afterwards issued for the debt and costs, amounting in the whole to 21*l.* 5*s.* 2*d.*, besides possession fees. The high-bailiff of the county court proceeded to levy upon the goods in the possession of Blainey on or about the 27th of November, 1856; whereupon the present appellant gave a written notice to the high-bailiff stating that she claimed the goods which he had seized in execution, and setting forth the particulars of her claim. An interpleader summons was afterwards issued; and thereupon the judge of the said county court at Wolverhampton, on the 18th of December, 1856, proceeded to hear and determine as to the validity of the said claim.(*a*)

The following facts were proved at the hearing:—

The appellant is an unmarried lady, residing at Oldbury, near Bridgenorth, in the county of Salop, and is the sister of Blainey's wife. In December, 1849, the appellant lent Blainey 100*l.*, for which he gave her his promissory note dated the 5th of December, 1849, payable on demand. Since that time, the appellant has received from Blainey at various times sums amounting to 30*l.*, for interest,—the last sum for interest having been paid on the 5th of December, 1855. Between the month of
*311] December, 1849, and the month of July, 1856, the *appellant, at Blainey's request, advanced him at different times several sums of money, amounting in the whole to upwards of 200*l.*, some of which he afterwards repaid. In the beginning of June, 1856, Blainey applied to the appellant for a further loan of 40*l.*, which she at first refused to lend him: but, subsequently, it was arranged that the appellant should advance the 40*l.*, and Blainey should give her a promissory note for that sum and also for the balance of the several sums she had previously lent

(*a*) Under the 13 & 14 Vict. c. 61, s. 14, the superior courts had no jurisdiction to hear an appeal from the decision of the county court upon an interpleader summons: Fraser, app., Fothergill, resp., 14 C. B. 298 (E. C. L. R. vol. 78); but the recent statute 19 & 20 Vict. c. 108, s. 68, gives them such jurisdiction where the money claimed, or the value of the goods or chattels claimed, or the proceeds thereof, exceeds 20*l.*, as well as in actions of replevin where the amount of rent or damages exceeds 20*l.*, and in actions for the recovery of tenements where the yearly rent or value of the premises exceeds 20*l.*

him. Accordingly, the appellant advanced the 40*l.*, and, on the 18th of June, 1856, Blainey signed a promissory note for 130*l.*, payable to the appellant or order, on demand.

Between the months of July and September, 1856, the appellant received from Blainey 30*l.* in cash and goods, at different times, on account of the said note.

In September, 1856, the appellant heard that Blainey had been deprived of his spirit-license, and she thereupon applied to him to repay her some of her money, and threatened to proceed against him unless he paid her some or gave her some security for it. Blainey said, that, if she would lend him 30*l.* more, he would give her security. She refused to lend him that sum; but she afterwards saw Blainey, and agreed to advance him the 30*l.* provided he would assign over to her all his effects as a security not only for the 200*l.* he then owed her, but also for the 30*l.* to be advanced. Blainey wanted to give security for the 30*l.* only, but, as the appellant objected, he said he would assign over the things, provided she would let him have possession of them.

On the 15th of October, 1856, the appellant and Blainey called at the office of Mr. Adams, a solicitor at Wolverhampton, and gave instructions for the assignment. The deed of assignment,—of which the following is a copy,—was prepared and executed on the 22d *of October, [*312
1856. Mr. Adams acted as the attorney of both parties, and was introduced by Blainey to the appellant, to whom he (Adams) was previously a stranger:—

"This indenture, made the 22d of October, 1856, between Samuel Blainey, of, &c., common brewer, of the onepart, and Emma Weaver, of, &c., of the other part: Whereas the said Samuel Blainey now stands indebted to the said Emma Weaver in the sum of 200*l.* for money at different time s heretofore lent and advanced by the said Emma Weaver to the said Samuel Blainey at his request, which he the said Samuel Blainey doth hereby admit and acknowledge: And whereas the said Samuel Blainey, being in want of money to meet the pressing demands of his creditors, has lately applied to the said Emma Weaver to advance and lend him a further sum of 30*l.*, which she the said Emma Weaver refused: And whereas the said Emma Weaver, immediately before determining to commence proceedings against the said Samuel Blainey for recovery of the said sum of 200*l.*, proposed to the said Samuel Blainey to advance and lend him the said sum of 30*l.*, upon having a mortgage of all the personal property of the said Samuel Blainey as security for the said sum of 200*l.* heretofore advanced, and also as security for the said sum of 30*l.* now lent and advanced, making together the sum of 230*l.*, with interest: And whereas the said Samuel Blainey, in order to obtain the said sum of 30*l.* as a further advance for the purposes aforesaid, has consented and agreed to give the security required: Now this indenture witnesseth, that, in pursuance of the said agreement, and in consideration of the said sum of 200*l.* now due and owing by the said Samuel Blainey to the said Emma Weaver; and also in consideration of the further sum of 30*l.* in hand now lent and advanced by the said Emma Weaver to the said Samuel Blainey,—the *receipt whereof he the said Samuel [*313
Blainey doth hereby admit and acknowledge,—he the said Samuel Blainey hath bargained, sold, assigned, transferred, and set over, and by these presents doth bargain, sell, assign, transfer, and set over unto the

said Emma Weaver, her executors, administrators, and assigns, all and singular the household furniture, stock in trade, brewing implements, linen, glass, earthenware, metal ware, cart, harness, pig, and all other goods, chattels, and effects whatsoever belonging to him the said Samuel Blainey, and being in and about the house, yard, and out-offices now in the occupation of the said Samuel Blainey, known or called by the name of the Mitre, situate at the Green, Tettenhall, near Wolverhampton aforesaid,—all of which before-mentioned personal estate and effects are more particularly described in the inventory hereunto annexed; To have, take, receive, and enjoy the said personal estate and effects intended to be hereby assigned, unto the said Emma Weaver, her executors, administrators, and assigns, as her own property and effects, free from all claim and demand of him the said Samuel Blainey, his executors or administrators, and of every other person and persons whomsoever; except and reserved, nevertheless, unto the said Samuel Blainey, his executors and administrators, so long as he shall continue to pay off the said sum of 230*l.* and interest hereby secured, by the instalments hereinafter stipulated, at the days and times and according to the proviso hereinafter expressed, the free use, possession, and enjoyment of the said personal estate and effects hereby assigned, but subject to the following proviso, namely, Provided always, that, in case the said Samuel Blainey, his executors or administrators, shall henceforth pay or cause to be paid unto the said Emma Weaver, her executors, administrators, or assigns, the sum of 5*l.* on the 5th of November next, and the sum of 8*l.* on every
*314] *succeeding twenty-eighth day afterwards until the whole of said sum of 230*l.* shall be fully paid and satisfied together with interest thereon at the rate of 5*l.* per cent. per annum, then this indenture shall become void: And the said Samuel Blainey, for himself, his executors and administrators, hereby covenants with the said Emma Weaver, her executors, administrators, and assigns, to pay the said sum of 230*l.*, with interest as aforesaid, by the instalments, at the times, and in manner aforesaid, without deduction: Provided also, that, in case default shall be made by the said Samuel Blainey, his executors or administrators, in payment of any one of the instalments at the time the same shall become due, then it shall be lawful for the said Emma Weaver, her executors, administrators, and assigns, at any time afterwards within his, her, or their discretion, to enter the said house, yard, out-offices, and other premises of the said Samuel Blainey, or to enter any other place wherein the said personal estate and effects hereby assigned, or any part or parts thereof, may be supposed to be secreted or placed; and, to give greater facility for the said Emma Weaver, her executors, administrators, and assigns, so to do, it shall also be lawful for the said Emma Weaver, her executors, administrators, and assigns, for any other person or persons by her, his, or their order, to break and force open any outer or inner door of the present or any after-taken dwelling-house and premises of the said Samuel Blainey, or any other place or building wherein any of the said personal property shall be confined, or supposed to be confined, without being liable to any indictment for forcible entry, or any action, suit, or process of law whatsoever, and to receive and take possession of all or any part of the said personal estate and effects hereby assigned, and afterwards to sell and dispose of the same for such price or prices as

can be reasonably got for the *same, and thereout in the first place [*315
to retain to and reimburse herself the said Emma Weaver, her executors, administrators, and assigns, all costs, charges, and expenses which may be incurred in and about making any such sale or sales, and also in and about the receipt and recovery of the said sum of 230*l.*, and, in the next place, to retain to and reimburse herself the said Emma Weaver, her executors, administrators, and assigns, the said sum of 230*l.*, or such sum of money on account thereof as shall remain after making the deductions aforesaid: Provided further, that, in case the said personal estate and effects intended to be hereby assigned, shall not realize the said sum of 230*l.* by sale thereof, after payment of all expenses, the remainder shall be applied in part payment of the said sum of 230*l.* and interest, and nothing herein contained shall prejudice the right or remedy of the said Emma Weaver, her executors, administrators, and assigns, to recover payment of the balance, by action upon the covenant. In witness," &c.

A schedule was annexed to the deed, comprising the furniture and effects in the house and premises, and the stock of ale and porter in the cellars.

The 30*l.* was then advanced to Blainey by the appellant.

The appellant swore, on the trial, that she did not know the first instalment under the bill of sale fell due on the second day after the court day when judgment was given against Blainey. It was arranged between the appellant and Blainey that the appellant should have power to take possession; and before she left Adams's office, it was arranged that the first instalment should be payable on the 5th of November. Blainey was to have possession of the effects as long as he paid the instalments. Mr. Adams had not been Blainey's attorney for more than a month previously. When Blainey and *the appellant left Adams's [*316
office, they left the bill of sale there, and went to Blainey's house; and it was then arranged that Blainey should sell the stock of ale, and pay her 1*s.* a gallon; and Blainey sold one hundred and twenty gallons, for which he had since paid her 6*l.*; and he was to continue in possession, and his name to remain over the door.

On cross-examination, the appellant also swore, that, when she gave Adams the order for the assignment, she had no knowledge whatever of Blainey being sued, or she would not have lent him the money; and that nothing was said to her about Blainey dividing the money amongst his creditors.

The appellant swore, that, when the assignment was executed, she had no knowledge that Blainey owed the debt of 16*l.* 12*s.* to the respondents; but it was proved, that, on the same day, soon after the execution of that deed, and while she was returning with Blainey to Tettenhall, a summons at the suit of the respondents was served upon Blainey in her presence.

A few days afterwards, Blainey brought 20*l.* to Adams, and desired him to write to all his creditors, offering them a composition of 2*s.* 6*d.* in the pound upon the amount of their respective debts. Adams, accordingly, on the 31st of October, 1856, wrote to the creditors, including the respondents, making them that offer. The 20*l.* above mentioned was part of the 30*l.* advanced by the appellant at the time of

the execution of the assignment. The respondents declined to accept the composition, and treated the assignment as fraudulent.

A copy of the assignment, with an affidavit of its execution, was registered on the 5th of November, 1856, pursuant to the statute 17 & 18 Vict. c. 36.

After the assignment was executed, Blainey remained in possession
*317] of the goods assigned, and to all *appearance carried on the business of a retail brewer as though no such assignment had ever been made; but payments were made by him to the appellant in respect of the ale, &c., included in the assignment, and sold by him in the course of his business.

On the 5th of November, 1856, the first instalment due under the assignment became payable, but was not paid. The appellant, however, did not enforce her power of sale under the assignment, but allowed Blainey to remain in possession as before.

When the respondents levied their execution on the 28th of November, Blainey was still in possession, and his name was still over the door.

On the 20th of January, 1857, the judge of the county court gave judgment on the interpleader summons in favour of the execution-creditors.

The question for the opinion of the court is, whether the above assignment or bill of sale was void as against the respondents, as execution-creditors of Blainey, seizing after the first instalment secured by the bill of sale became due, and whilst Blainey was allowed to remain in possession, and with his name over the door, as it had been before. If the court should be of opinion that the assignment was void, the judgment of the county court was to stand; but, if the court should be of opinion that the assignment was not so void as against the respondents, the judgment of the county court was to be reversed, and judgment entered for the appellant.

*318] *John Gray*, for the appellant.(*a*)—The facts which *the judge of the county court has found, clearly entitle the appellant to judgment. The learned judge seems to have acted upon Twyne's Case, 3 Co. Rep. 80, as that decision was understood before it was explained by the recent authorities.

Dowdeswell, for the respondents.(*b*)—The assignment was fraudulent. [COCKBURN, C. J.—The county court judge has not so found.] The

(*a*) The points marked for argument on the part of the appellant, were,—

"That, there having been a valid consideration for the assignment, and the deed having been duly filed, with an affidavit, pursuant to the 17 & 18 Vict. c. 36, it was not void as against the respondents; and that the case disclosed no such evidence of fraud on the part of the appellant and Blainey, or either of them, as to defeat the legal effect of the assignment, which passed the property in the goods to the appellant, who, by registering the same pursuant to the statute, and before the seizure by the high-bailiff, acquired a good right to the goods as against the respondents."

(*b*) The points marked for argument on the part of the respondents, were,—

"1. That, on the default of Blainey in payment of the first instalment due under the bill of sale of the 22d of October, 1856, the appellant became absolutely entitled to the possession of the goods and chattels mentioned in the bill of sale; and that the continuance of Blainey in the possession and exclusive use of the said goods and chattels subsequently to the said 5th of November by the appellant's consent, was evidence of fraud, which justified the judge of the county court in deciding that the said bill of sale was void as against the respondents:

"2. That the question whether the bill of sale was or was not void as against the respondents, was a question of fact; and that, the judge of the county court having decided that question in favour of the respondents, no appeal lay against his decision."

whole was a question of fact. In the notes to Twyne's Case, in Smith's Leading Cases, Vol. I., p. 1, it is said that "it may be safely laid down, that, under almost any circumstances, the question of fraud or no fraud is one for the consideration of the jury;" citing, amongst other cases, Martindale *v.* Booth, 3 B. & Ad. 498 (E. C. L. R. vol. 23), and Lindon *v.* Sharp, 6 M. & G. *898 (E. C. L. R. vol. 46), 7 Scott N. R. 730. The judge has done nothing more here than state facts, leaving it to the court to say whether the assignment was bonâ fide or not. [*319 [COCKBURN, C. J.—He evidently founds his judgment upon the fact of the assignor having remained in possession of the goods after the first instalment became due. If the facts which the judge has found do not disentitle the appellant to judgment, she is to have judgment. Unless he has found against the respondents upon the facts, there is nothing submitted to us. He evidently wants to know whether under the circumstances he has stated the assignment was valid.] He does not say so. In truth there is no question of law presented for decision.

COCKBURN, C. J.—The question submitted to us really is not arguable. Without saying more, I think the appeal must be allowed.

CROWDER, J.—The judge asks us, in effect, whether, in point of law, under the circumstances he has presented, the appellant is entitled to judgment. I am of opinion that she is.

WILLES, J.—It is expressly found by the case that the assignment was bonâ fide.

Judgment for the appellant, with costs.

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*FLIGHT *v.* GRAY. *Nov.* 25. [*320

An equitable defence under the 17 & 18 Vict. c. 125, s. 83, is admissible only where it sets up matter in respect of which a court of equity would have granted relief unconditionally.

The court therefore refused to allow a defendant to plead to an action against him as acceptor of a bill of exchange, that the bill was a renewal of a former bill which had been accepted upon a distinct understanding that it was to be renewed from time to time until the defendant should be of ability to meet it, he paying in the mean time interest at 10 per cent., that the defendant had always performed his part of the agreement, but that the plaintiff had refused to renew the bill upon application for that purpose, although he well knew that the defendant was not of ability to pay it.

THIS was an action by the drawer against the acceptor of a bill of exchange for 75*l.*, bearing date the 2d of March, 1857, and payable at four months' date; with a count upon accounts stated.

Henderson, on a former day, obtained a rule to show cause why the defendant should not be at liberty to plead the following pleas,—1. Failure of consideration, the consideration being the granting of a life policy, which was never granted, that the bill was a renewal of one given for securing the first year's premium, and that no policy had been granted, and alleging that the accounts were stated concerning the bill. 2. An equitable plea, stating, as the fact was, that the bill was a renewal of a bill accepted upon a distinct promise by the plaintiff, that, if the defendant would pay discount at 10 per cent., the plaintiff would renew from time to time until the defendant was of ability to meet the bill; that the defendant accepted the bill upon the faith of that promise, which he would not otherwise have done, and had always kept his part

of the contract, but the plaintiff had broken it, and had refused to renew upon the defendant's application to him to do so; and that the defendant had never been of ability to pay the bill declared on, as the plaintiff always knew; and alleging that the accounts were stated of and concerning the bill sued on.

Petersdorff showed cause.—The defendant, by the equitable plea proposed to be pleaded, seeks to set up a contemporaneous oral contract to
*321] vary the character *of the security declared on, which, though it might be the subject of a cross-action, cannot control or suspend the plaintiff's right: Adams *v.* Wordley, 1 M. & W. 374;† Ford *v.* Beech, 11 Q. B. 852 (E. C. L. R. vol. 63); Webb *v.* Spicer, 13 Q. B. 886 (E. C. L. R. vol. 66), affirmed in Cam. Scac. 13 Q. B. 894, and in Dom. Proc. (Salmon *v.* Webb) 3 House of Lords Cases 510. [COCKBURN, C. J.—That will not be disputed by Mr. *Henderson:* all those cases were before equitable pleas were allowed.] To bring himself within the 83d section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, the defendant must show that the matter proposed to be pleaded would have entitled him to an absolute perpetual and unqualified injunction in a court of equity: Mines Royal Societies *v.* Magnay, 10 Exch. 489, 493;† Steele *v.* Haddock, 10 Exch. 643;† Teede *v.* Johnson, 11 Exch. 840;† Wodehouse *v.* Farebrother, 5 Ellis & B. 277 (E. C. L. R. vol. 85); Wood *v.* The Copper-Miners Company, 17 C. B. 561 (E. C. L. R. vol. 84). [COCKBURN, C. J.—The object of these provisions, is, to enable a court of law to do substantial justice between the parties, by doing that at once which might be done by having recourse to a court of equity. What would a court of equity do here? Would an injunction be granted to restrain the plaintiff from obtaining the fruits of a judgment at law?] Woollam *v.* Hearn, 7 Ves. 211 *b*, shows that this would not be a case for relief in equity to the extent required by the authorities to justify such a plea as this. [COCKBURN, C. J.—The defendant is seeking not to substitute another contract for that declared on, but to bring the real, the entire contract before the court. A court of equity would probably grant an injunction upon terms, on payment of the interest, for instance, and tendering a new acceptance: but that we have no power to enforce.]

*322] *Henderson*, in support of his rule.—The relief which *a court of equity would grant in this case would be permanent and unconditional as to the bill sued on. [WILLIAMS, J.—Would it not be part of the decree in equity, that the renewed bill should be given and the 10 per cent. paid?] The plaintiff has brought an action which he ought not to have brought, inasmuch as he is under an obligation to receive a renewed bill, which has been tendered. The defendant could get no relief in equity, unless he showed that he was prepared to perform his part of the contract. [COCKBURN, C. J.—The plaintiff is entitled to something more than a tender: the effect of the plea is, to stay his action.] Innes *v.* Munro, 1 Exch. 473,† shows that this plea presents a substantial defence; for, for all purposes of equity, a contemporaneous oral agreement is as good as a written agreement. [WILLES, J.—The case you cite from 7 Vesey shows the contrary. Have you any case showing that Adams *v.* Wordley is not good equity as well as law?] This plea may be good at common law. [COCKBURN, C. J.—We ought to be informed what sort of relief a court of equity would grant in such

a case,—whether absolute or conditional, and upon what terms. If conditional relief only would be granted, then, for the reasons stated in the cases referred to, we cannot allow the proposed equitable defence to be put upon the record.]

Henderson, on a subsequent day, stated, that he had ascertained, upon inquiry, that a court of equity, under the circumstances here stated, would only grant the defendant relief upon his tendering a renewed bill and paying the discount, and that an order to do so would form part of the decree.

COCKBURN, C. J.—This rule must be discharged. I am of opinion that we can only allow an equitable plea *under the 83d section [*823 of the Common Law Procedure Act, 1854, where, if the application were made under the 86th section, we would decline to set it aside. The 83d section, we think, only enables the defendant to plead by way of equitable defence such facts as would entitle him to absolute and unconditional relief in a court of equity. It only applies where this court can deal out the same measure of justice between the parties as the court of equity would do. It seems, that, under the circumstances of this case, a court of equity would compel the defendant to do justice, that is, to give the renewed bill and pay the 10 per cent. discount, before they would restrain the plaintiff's proceedings at law. We have no power to enforce this. The plea alleges a tender; but, when the defendant has got the benefit of his plea, what power have we to compel him to carry that tender into effect? The machinery of this court is not adequate to the purpose. The rule will be discharged, the plaintiff's costs being costs in the cause.

The rest of the court concurring,

Rule discharged accordingly.

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*In the Matter of the Complaint of JOSEPH HORNBY BAXENDALE and Others, carrying on business under the firm of PICKFORD & CO., Common Carriers, *v.* THE NORTH DEVON RAILWAY COMPANY. *Nov.* 9. [*824

A railway company possessed of a line from B. to C., advertised to convey goods from A. to C. (in conjunction with another company) at the rate of 50*s.* per ton, *provided they were consigned by and to their own agents at those respective places;* but, if consigned through any one else, they charged 2*s.* 6*d.* per ton more:—Held, ground for an injunction under the Railway Traffic Act, 17 & 18 Vict. c. 31.

And the rule was made absolute *with costs*, although it prayed a writ enjoining the company to charge an equal rate for the carriage from A. to C., and the writ was granted as from B. to C. only.

Semble, that both companies ought to have been brought before the court by the rule.

BYLES, Serjt., in Trinity Term last, obtained a rule calling upon The North Devon Railway Company to show cause why a writ of injunction should not issue against them pursuant to the Railway and Canal Traffic Act, 1854, 17 & 18 Vict. c. 31, enjoining the company to charge the same rate for the carriage of all goods of the same class from Bristol to Barnstaple; and also enjoining the company to charge the complainants and the rest of the public for the carriage from Bristol to Barnstaple of goods coming from Manchester, the same rate as they charged

for the like goods when consigned by their own agents, and enjoining the company not to charge otherwise,—with costs.

The affidavit upon which the motion was founded,—that of Mr. J. H. Baxendale, one of the complainants,—was in substance as follows:—

1. The complainants carry on the business of common carriers and railway agents, under the name and style of Pickford & Co., and as such carry on a goods traffic between the towns of Manchester and Barnstaple in the manner hereinafter mentioned, that is to say, they act as agents at Manchester for the London and North Western Railway Company, and receive and collect and cart to the station of that company at Manchester goods consigned by the public to Barnstaple, to be
*325] forwarded as hereinafter mentioned: such goods are *then delivered to the complainants at Bristol, from whence they forward them as hereinafter mentioned:

2. The lines of railway between Manchester and Barnstaple are as follows,—The London and North Western and Midland lines from Manchester to Bristol, the Bristol and Exeter line from Bristol by way of Exeter to Crediton, and the North Devon line from Crediton to Barnstaple:

3. The North Devon Railway Company are the owners of such last-mentioned line, and in conjunction, with the Bristol and Exeter Railway Company at Bristol, receive and carry through goods from Bristol to Barnstaple:

4. When goods are received by the complainants at Manchester which are consigned for Barnstaple, the complainants deliver them to the London and North Western Railway Company at their station at Manchester, and that company, in conjunction with the Midland Railway Company, carry them over the London and North Western and Midland railways from Manchester to Bristol. The complainants are charged by these companies a through rate from Manchester to Bristol of 30*s.* per ton, which they pay, and charge again to the consignors or consignees of the goods: this rate includes delivery by carting to the Bristol and Exeter Railway Company's station at Bristol. The London and North Western Railway Company pay the complainants for such collection and carting at Manchester, and the Midland Railway Company pay the complainants for so carting such goods from the station of that company at Bristol to that of the Bristol and Exeter Railway Company:

5. Such goods having arrived at the station of the Bristol and Exeter Railway Company at Bristol, the complainants then, on their own account as common carriers, consign them at such station to themselves
*326] or *their agent at the station of the North Devon Railway Company at Barnstaple, and they are then forwarded to Barnstaple over the lines of the Bristol and Exeter and North Devon Railway Companies. At the Barnstaple station, the agent of the complainants receives such goods, and delivers them to the consignees in the town. The North Devon Railway Company charge to the complainants and to the public in general at the rate of 1*l.* 2*s.* 6*d.* per ton for such carriage from the Bristol and Exeter station at Bristol to the Barnstaple station at Barnstaple.

6. Until the alteration in their mode of charging made by the North Devon Railway Company hereinafter mentioned, the complainants were in the habit of charging for the through carriage from Manchester to

Barnstaple the two rates of 80*s.* and 22*s.* 6*d.* charged by the London and North Western and Midland Railway Companies added together, with a small additional charge for delivery in Barnstaple:

7. Messrs. Carver, Chaplin & Co., of Manchester, are also agents in Manchester of the London and North Western Railway Company, and perform similar services for such company at Manchester as the complainants perform; but Carver, Chaplin & Co. have nothing to do with such goods at Bristol. The goods for Barnstaple which are collected by them at Manchester are consigned by them to W. J. C. Wall, of Bristol, who is the sole agent there of the Bristol and Exeter Railway Company:

8. The North Devon Railway Company, as the complainants verily believe, have recently entered into and acted upon an arrangement with Wall, by which he receives such last-mentioned goods at the station of the Midland Railway Company, and transfers them to the Bristol and Exeter Railway station, and thence forwards them by the Bristol and Exeter and North Devon *Railways to Barnstable, where the [*327 agents of the last-mentioned company delivered such goods in the town; and the said company, although they have to pay the said rate of 80*s.* per ton to the London and North Western Railway Company and the said Midland Railway Company for the carriage from Manchester to the Bristol and Exeter Railway Company's station at Bristol, yet charge only 50*s.* per ton for the carriage of such goods from Manchester, including the delivery in the town to the consignees at Barnstaple; *whereby the said North Devon Railway Company charge and compel the complainants and the public to pay* 2*s.* 6*d. per ton more for goods forwarded by them from Bristol to Barnstaple than the said company charge to other persons*, besides making no allowance or deduction from the said charge to the complainants for cartage from the station at Barnstaple into the town.

The affidavit then set out certain correspondence between the complainants and their solicitors and the manager and another servant of the North Devon Railway Company, amongst which was the following:—

"Barnstaple, May 5th, 1857.

"Manchester Packs.

"Messrs. Pickford & Co., Barnstaple.

"Gentlemen,—In reply to yours of the 2d with reference to the above, I beg to say that the only rate we can charge you for Manchester goods as from Bristol, would be our present through rate of 22*s.* 6*d.* per ton. Our through rate from Manchester direct of 50*s.* per ton *can only be obtained* by these goods being consigned from Manchester to Bristol by Carver & Co., and thence to Barnstaple by J. C. Wall. I presume this mode of conveyance would not meet your views.

(Signed) "A. PATEY."

"20 Austin Friars, 9th May, 1857.

"Sir,—Our clients, Messrs. Pickford & Co., have *consulted [*328 us upon your letter to them of the 5th instant, from which it appears that the North Devon Railway Company charge them 22*s.* 6*d.* per ton on goods carried from Bristol to Barnstaple, but that the company only charge the public 20*s.* if they send through Carver & Co., at Manchester, and Mr. Wall, at Bristol, the agents of the company.

"Out of the 50*s.* per ton which the company charge on such goods be-

tween Manchester and Barnstaple, they have to pay 30*s.* per ton to the London and North Western and Midland Companies for conveyance from Manchester to the Bristol and Exeter Company's station at Bristol, thus leaving only 20*s.* per ton for the conveyance over the Bristol and Exeter and North Devon lines, and delivery in Barnstaple. We have advised Messrs. Pickford & Co., that, under these circumstances, they are entitled to have the goods sent from Manchester through them, and by them delivered at the station at Bristol, and consigned to themselves at Barnstaple station, carried over the company's line at the rate of 20*s.* per ton, less a fair and reasonable allowance for the delivery in Barnstaple (which they perform themselves), instead of your present rate of 22*s.* 6*d.* per ton; and they have instructed us to require you to convey such goods for them accordingly, or, in the event of your still refusing to do so, to refer us to your solicitors, with whom we may arrange to have the question decided in a court of law.

"TATHAM, UPTON, UPTON & JOHNSON."

The reply of the manager was as follows:—

"Barnstaple, May 15th, 1857.

"Messrs. Tatham, Upton & Co.

"Gentlemen,—I beg to acknowledge the receipt of your letter. Your clients appear to possess a faculty in the division of rates, and arrogate to themselves a more perfect knowledge of my business than either *their
*329] experience or information warrants. I shall be very glad to convey Manchester Packs for Pickfords through my appointed agents on the same terms that I offer to other members of the public; and I decline going any further into the matter.

(Signed) "ROBERT OGILVIE."

Milward (with whom was *Lush*, Q. C.) now showed cause, upon an affidavit of one Andrew Patey, the general traffic manager of the railway, who deposed in substance as follows:—That Messrs. Brassey & Ogilvie now work, and for some years past have worked, the traffic of the North Devon railway on their own account and for their own profit, Brassey being the lessee of the said railway under an agreement for a lease from the company, dated the 21st of February, 1851; and that the company take no part directly or indirectly in the working or management of the said traffic: That the North Devon Railway is connected at Crediton with the Exeter and Crediton Railway, which again is connected at Exeter with the Bristol and Exeter Railway, so that by the lines of these three railways a continuous communication by railway is formed between Barnstaple and Bristol; and that the Exeter and Crediton Railway is leased to and worked by the Bristol and Exeter Railway Company, so that practically the whole line from Crediton to Bristol belongs to or is under the sole control of that company, and the traffic upon and over that line is managed and worked by them: That neither the North Devon Railway Company nor Brassey as their lessee, nor Messrs. Brassey & Ogilvie, have any control over the traffic arrangements of or the rates charged by the Bristol and Exeter Railway Company; and the two railways and the management of them are wholly independent of each other, except that from time to time friendly arrangements have been and are made between
*330] the Bristol and Exeter Railway *Company and Brassey & Ogilvie in respect of the through traffic passing over their respective lines, for their mutual convenience and for the accommodation of the public:

That the Bristol and Exeter Railway Company have, and for some years past have had, an engagement or contract with a Mr. Wall, of Bristol, under which Mr. Wall, as their goods agent, conducts the whole or the greater part of the goods carrying traffic over these lines, including the Exeter and Crediton Railway, receiving and collecting the rates of carriage as published and demanded by the Bristol and Exeter Railway Company, and deducting from such receipts, and detaining for his own use, a certain proportion of such rates: That there is a class of goods called "Manchester Packs," which, when consigned to or destined for places beyond Bristol to which the lines of the Bristol and Exeter Railway Company and of the North Devon Railway Company afford access, are conveyed, as stated in the affidavit of the complainants, by the London and North Western and Midland lines, to Bristol, and from thence, when destined, for example, to Barnstaple, would in the ordinary course be conveyed from the station of the Midland Railway Company at Bristol to the station of the Bristol and Exeter Railway Company there, and so be passed on to such destination: That, for the carriage of these packs over the lines of the Bristol and Exeter Railway Company to the North Devon Railway from Bristol to Barnstaple, the charge was formerly (as alleged) 22*s.* 6*d.* per ton; but, inasmuch as there was a competition for this traffic by steamer from Bristol to Barnstaple, an arrangement was some time ago made between Messrs. Brassey & Ogilvie and the directors of the Bristol and Exeter Railway Company, through Wall, acting as the goods agent of the said company, whereby the through rate upon these packs from Bristol to Barnstaple by the *lines of the two railway companies was reduced from 22*s.* 6*d.* to 20*s.*, thus making [*331 the entire rate from Manchester to Bristol 50*s.*, instead of, as before, 52*s.* 6*d.*: That this reduction was advertised, and has since been acted upon, and the benefit of it was and is, without exception or distinction, offered to all persons consigning packs from Manchester to Bristol, but *with an intimation that such benefit can only be assured to the consignees, by ordering their packs by Carver & Co. from Manchester, to the care of J. C. Wall, Bristol,* who will forward them on immediately: That this intimation was given, because, by reason of the before-mentioned contract of the Bristol and Exeter Railway Company with Wall, Messrs. Brassey & Ogilvie had never been able to make any arrangement with that company for the reduction of the through rate on such goods, except on the condition of the consignments being so made through Wall; and the only effect of a refusal on their part to assent to that condition would have been that the public would not and could not have had the benefit of the reduction at all; but that all persons whomsoever consigning their goods through Carver & Co. to the care of Wall, without any exception, favour, or distinction, are entitled to and may and do receive the benefit of the said reduced rate; and that, if this court should determine that the complainants are entitled to send Manchester packs from Bristol to Barnstaple in any other manner than through Carver & Co. to the care of Wall, at the rate of 20*s.* per ton from Bristol to Barnstaple, or if the court should restrain the North Devon Railway Company in the manner prayed by the rule, the contract with Wall will be at an end, and the public will lose the benefit of the arrangement: And that, except as above mentioned, the imposing of the said condition was in no respect the act of the North

*332] Devon Railway Company, or of Brassey as their lessee, *or of Brassey & Ogilvie; and that, in so far as the North Devon Railway Company, or Brassey, or Brassey & Ogilvie, were concerned, neither of them derived any benefit or advantage from the said arrangement of the Bristol and Exeter Railway Company with Wall, or was interested therein in any respect.

This application should have been addressed against the Bristol and Exeter Railway Company, and not against the North Devon Railway Company: if there be any overcharge, it arises from the act of the former company alone. But it is submitted that there is no pretence for saying that there has been any undue preference. [COCKBURN, C. J.—The practical result of your arrangement is, that the goods are carried for 2*s.* 6*d.* per ton less, if they are sent through Carver & Co. and Wall. What right has the company to impose such a restriction upon the consignors of goods?] The affidavit in answer shows that what is done is done for the benefit of the public, and not for the purpose of giving any undue preference to any one. [COCKBURN, C. J.—How can it be for the benefit of the public that they should be compelled to transmit their goods through a given individual?] Ransome's case, 1 C. B. (N. S.) 437, establishes, that, in dealing with this statute, the court will take into the account the fair interests of the company. And The Caterham Railway Company's Case, 1 C. B. (N. S.) 410, shows, that, to constitute an "undue or unreasonable preference" within the act, by reason of an inequality of charge, it must be an inequality in the charge for travelling over the *same* line or the *same portion* of the line. Here, the inequality, if any, is not for travelling along the North Devon Railway. [COCKBURN, C. J.—The whole is one charge. The North Devon Railway forms an integral part of the whole line.] If the goods are not transmitted through *333] Carver & Co., the North Devon Railway Company can *only be responsible for any inequality of charge for carriage on their own portion of the line. [COCKBURN, C. J.—The charge is one entire charge; and, unless the whole is justifiable, the injunction must go.] If the Bristol and Exeter Railway Company had been made parties to this rule, the North Devon Railway Company would only have had to sustain their fair share of the responsibility.

Byles, Serjt., and *C. Pollock*, in support of the rule.—The complaint of inequality of charge and undue preference is not answered. [COCKBURN, C. J.—The rule ought at all events to be limited so as to impose upon the North Devon Railway Company so much only of the burthen as properly belongs to their line.] They do not divide the charge: they advertise and receive the rate for the entire transit: they do not the less misconduct themselves, because another company is associated with them in the illegal act complained of. [COCKBURN, C. J.—It would have been more convenient if all the parties had been before us. CROWDER, J.—What charge do these respondents make for the carriage between Crediton and Barnstaple?] They do not carry any goods coming from Bristol for less than 22*s.* 6*d.* per ton, unless they are consigned through Carver & Co. [COCKBURN, C. J.—The rule is too large. The complainants' purpose will be answered probably by making it absolute in the more limited form above suggested.] That will answer every purpose.

COCKBURN, C. J.—We entertain some doubt whether the rule might

not have been made absolute in its terms: but it is unnecessary to consider that, inasmuch as the complainants are content to take it for a writ against the respondents enjoining them to charge the same rates for the carriage of Manchester Packs from *Crediton to Barnstaple as they charge for the like goods under any circumstances, and enjoining them not to charge otherwise. [*334

Lush, for the respondents, submitted, that, as the complainants had asked more by their rule than the court had thought them entitled to, the costs of the application should not be allowed.

COCKBURN, C. J.—The complainants have succeeded in substance. As we think they have made out a real ground of complaint, we think the costs should follow.

The rest of the court concurring,

Rule absolute accordingly, with costs.

KNOX *v.* BUSHELL. *Nov.* 24.

A husband is not liable for *money lent* to his wife, though it be afterwards applied by her in procuring necessaries, for the supply of which he *would* have been liable.

A. lent B.'s wife 59*l.* for the purpose of enabling her to pay debts and to provide herself a passage to the Cape of Good Hope, whither she was going to join her husband, at his direction; and she so applied it:—Held, that A. could not recover any part of the amount from B.

THIS was an action for money lent, money paid, &c. Plea, never indebted.

The cause was tried before Cresswell, J., at the second sitting in London in this term. The facts were as follows:—

The defendant was a merchant at the Cape of Good Hope. Early in the year 1856, he sent his wife with three children and a servant to England, giving her 200*l.* and a credit on his partner, who resided in *London, for 50*l.* per month. The partner, however, having failed, all she obtained from him was 20*l.* In November, 1856, the wife received a letter from her husband desiring her to go out to the Cape. She thereupon applied to the plaintiff for an advance of money, for the purpose of paying some debts which she had contracted for necessaries, and of providing her a passage out. Of the money advanced to her by the plaintiff (59*l.*), 31*l.* was applied in part payment of the passage-money, the rest in payment of debts. [*335

On the part of the defendant, it was insisted that the husband could not be charged for a loan of money to the wife, even though it should be proved to have been borrowed for the purpose of procuring necessaries, and to have been actually so applied.

For the plaintiff it was submitted, that, inasmuch as the wife was here with her husband's consent and permission, and was returning at his express desire, to the extent, at all events, of the sum necessarily paid for her passage out, the plaintiff was entitled to recover.

The learned judge, however, was of opinion that there was no evidence to go to the jury of any authority in the wife, express or implied, to charge her husband either in respect of that portion of the loan which

was applied in payment of the passage-money, or of that which was expended in liquidation of the debts: and the plaintiff was nonsuited.

Shee, Serjt., now moved for a new trial, on the ground of misdirection.—Admitting that, in general, the husband is not liable for *money lent* to the wife, it is submitted, that, under the peculiar circumstances of this case, there was evidence of a sufficient authority in the defendant's wife to bind him for the advances in question. The purpose for *336] which the money was lent *distinguishes this from all former cases, viz. the payment of her passage-money on going out to the Cape to rejoin him at his express command. In Turner *v.* Rookes, 10 Ad. & E. 47 (E. C. L. R. vol. 37), 2 P. & D. 294, a husband was held liable for costs incurred by an attorney employed by the wife to exhibit articles of the peace against him. [CROWDER, J.—Have you any authority that money lent to the wife, though for a specific purpose, may be recovered in an action against the husband?] There is no case expressly in point, at law: but there is a case in equity which comes very near this,—Harris *v.* Lee, 1 P. Wms. 482. There, J. S. had given his wife the foul distemper twice; upon which the wife, leaving her husband, and coming to town to be cured, borrowed 30*l.* of the plaintiff, to pay doctors and surgeons, and for necessaries. J. S. afterwards devised some lands for the payment of all his debts, and died. The plaintiff (the lender) brought his bill against the trustees, who were empowered by the will to sell the land for the payment of debts, in order to be paid this money, as a debt within the trust. It was objected that a wife cannot by law borrow money, nor contract a debt by borrowing money, even though such money be afterwards applied for necessaries; because it was in her power to waste the money:(*a*) and, if the *law* be so, it would be hard to have a different rule of property *in equity*. Sed per Cur. "Admitting the wife cannot at law borrow money, though for necessaries, so as to bind the husband, yet this money being applied to the use of the wife for her cure and for necessaries, the plaintiff that lent this money must in equity stand in the place of the persons who found and provided such necessaries for the wife. And therefore, as such persons would be creditors of the husband, so the plaintiff shall *337] stand *in their place and be a creditor also:" and payment was decreed, with costs. [CROWDER, J.—That seems rather at variance with the rule at law.] An action will lie for a loan to the wife at the request, express or implied, of the husband: Stevenson *v.* Hardie, 2 W. Blac. 872. Blackstone, J., thus lays down the rule in that case,—"It is true that no complete or perfect contract can be made by a feme coverte by her own authority; yet, by the assent of her husband, she may contract as his substitute, as in case of either sale or loan. This assent may be either express or implied: it may be prior or subsequent to the contract. If prior, and communicated to the husband (as in the present case), the contract is made *actually*, and not merely *virtually*, with the husband: if subsequent, the wife's contract is inchoate and imperfect till affirmed or disaffirmed by the husband; and such affirmation, if given, transfers the contract to him." Here, the loan may fairly be said to have been contracted with the implied assent of the husband, inasmuch as it was contracted, and the money actually (in

(*a*) Earle *v.* Peale, 1 Salk. 387.

part) applied, in furtherance of the husband's directions, to enable her to obey which the husband had made no other provision. Having obtained the money for that specific purpose, and having so applied it, the question is whether the wife may not be considered as the husband's agent. It is, as De Grey, C. J., observes in Stevenson *v.* Hardie, "a poor shift" to evade liability. Probably the only part of the advance that the plaintiff can recover, is, the 31*l.* paid for the passage-money. [CROWDER, J.—The whole 59*l.* was *lent* to the wife. I cannot see any distinction between the 31*l.* and the rest of the money. COCKBURN, C. J.—Was there any evidence that the plaintiff, when he advanced the money, gave any specific direction, or imposed any condition, as to the application of it?] There was not: all that appeared, was, *that [*338 the wife went to the plaintiff and told him she wanted money for the purposes specified, and that he advanced it, assuming that it would be so applied.

COCKBURN, C. J.—I do not think there ought to be a rule in this case. If there had been anything to constitute the wife the agent of her husband in the transaction, the case might have been different. But the money seems to have been advanced as a loan to the wife: and the authorities show that the fact of its being applied by her in providing necessaries for herself and family, will not make the husband responsible.

WILLIAMS, J.—All that the evidence amounts to is this, that the money was advanced to the wife by way of loan, upon her representation as to the way in which she proposed to apply it.

The rest of the court concurring, Rule refused.

EGERTON and Wife *v.* MASSEY and Others. *Nov.* 20.

A testatrix, being seised in fee of certain lands, devised the same to her niece E. *for life*, remainder to her children, and, in default of issue, to her nephew P. H. in fee: and, by a residuary clause, the testatrix gave "all the residue and remainder of her estate and effects, whatsoever and wheresoever, not thereinbefore disposed of, unto her said niece E., her heirs and assigns, for ever. E. died without issue, having survived the testatrix, and having by lease and release conveyed all her estate to J., in fee:—Held, that the reversion in fee, undisposed of by the former part of the will, passed to E. by the residuary devise; and that, the life estate and the reversion having both become vested by the conveyance in J., the contingent remainder of P. H. was destroyed by the merger thus occasioned.

THIS was an action brought by the plaintiffs against the defendants to recover possession of a certain messuage and tenement, lands and premises, called The Asps, situate at Antrobus, in the county of Chester, *and, by consent of the parties, according to the Common Law [*339 Procedure Act, 1852, the following case was stated for the opinion of this court:—

Elizabeth Glover, being seised in fee-simple of the messuage and tenement, lands and premises, the subject of this ejectment, by her last will and testament, bearing date the 11th of May, 1786, duly executed and attested for the devise of lands of inheritance, gave and devised the same (inter alia) in the words following:—

"I give and devise unto my niece Eunice, the daughter of my sister Eunice Highfield, all that my messuage and tenement called The Asps, with the lands and appurtenances thereto belonging, situate in Antro-

bus, within the lordship of Over Whitley, in the county of Chester, containing eight acres, or thereabouts." "To hold the same unto my said niece and her assigns for and during the term of her natural life, without impeachment of waste; and, from and after her decease, I give and devise the said premises unto and amongst all and every or such one or more of the children of my said niece, at such time and times, and in such parts, shares, proportions, manner, and form as she my said niece, in and by any her act or deed in writing, with or without power of revocation, to be by her signed, sealed, and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing purporting to be her will, to be by her signed, sealed, published, and declared in the presence of and attested by three or more credible witnesses, shall direct, limit, or appoint." "And, for want of such direction, limitation, or appointment, then I give and devise the said premises unto and amongst all and every the child and children of my said niece, if more than one, who shall be living at her decease, and the issue of such of them as shall be then dead, such
*340] issue to take only the share *which the parent of such issue could, if living, have taken, as tenants in common, and not as joint tenants, and to their several heirs and assigns for ever, and, if there shall be but one such child or issue, then to such child or issue, and his or her heirs and assigns, for ever; and, for want of such child or issue, I give and devise the said messuage and tenement called Asps, and the lands and appurtenances thereto belonging, unto my nephew Peter Highfield, the younger son of my said sister, and to his heirs and assigns for ever: And I give and devise the said three several closes, fields, or parcels of land called The Heathfields, with their appurtenances, unto my nephew John Highfield, the elder son of my said sister, and to his heirs and assigns for ever: Provided always and I do hereby subject and charge my said messuage, tenement, and lands, with the payment of one clear rent or yearly sum of 10*l.*, which I give and bequeath and direct to be issuing therout, unto my said sister and her assigns, during her natural life, by two equal payments in each year, to wit, the 29th day of September and the 25th day of March, the first payment thereof to be made upon such of the said days as shall happen next after my decease."

And, after giving the usual powers of distress and entry for the recovery thereof, the testatrix continued in the words following:—

"And, if my said niece shall happen to die without issue in the lifetime of her said mother, I do from thenceforth order and direct that the said rent or yearly sum of 10*l.* shall be divided and paid as follows, namely, 6*l.*, part thereof, by my said nephew Peter Highfield, and his heirs, and 4*l.*, residue thereof, by my said nephew John Highfield, and his heirs, from and out or in respect of the premises severally devised to them as aforesaid."

*341] *And, after giving various legacies, the testatrix continued, in the words following:—

"And I give and bequeath all the residue and remainder of my estate and effects, whatsoever and wheresoever, not hereinbefore disposed of, unto my said niece Eunice Highfield, her heirs and assigns, for ever."

The said testatrix departed this life on or about the 20th of Novem-

ber, 1789, without having altered or revoked her said will, leaving the said Eunice Highfield and Peter Highfield her surviving; and thereupon the said Eunice Highfield entered into possession of the said messuage and tenement, lands and premises called The Asps, and continued so possessed up to the 6th of December, 1855, when she died, never having been married.

By indentures of lease and release bearing date respectively the 1st and 2d of October, 1832, made between the said Eunice Highfield, of the one part, and one Peter Jackson, of the other part, the said Eunice Highfield granted, bargained, sold, released, and confirmed unto the said Peter Jackson, his heirs and assigns (inter alia), the said messuage and tenement, lands and premises, the subject of this ejectment, To hold the same unto the said Peter Jackson, his heirs and assigns, to the use of the said Peter Jackson, his heirs and assigns, for ever, upon such uses, trusts, and purposes as the said Eunice Highfield should by deed appoint; and, in default of such appointment, to the use of the said Eunice Highfield, her heirs and assigns, for ever.

The plaintiffs claim as devisees under Peter Highfield, who died in 1827, and are entitled to recover, unless the limitation in favour of Peter Highfield was destroyed by the indentures of the 1st and 2d of October, 1832.

The defendants Eunice Highfield Jones and Hannah Highfield Jones are devisees of the said messuage and *tenement, lands and premises, under the will of the late Eunice Highfield, and also [*342 claim under a conveyance of the said premises made to them by the devisee of the heir-at-law of the said Peter Jackson, who died intestate as to his trust estates.

The question for the opinion of the court, was,—whether the limitation in favour of Peter Highfield was destroyed by the indentures of the 1st and 2d of October, 1832. If the court should be of opinion that it was, then the verdict was to be entered for the defendants: otherwise the verdict was to be entered for the plaintiffs.

The several indentures, and the probate of the will of the said Elizabeth Glover, mentioned in the case, were to be taken as part of it, and might be referred to by either party.

Shapter (with whom was *E. Beavan*), for the plaintiffs.(*a*)—The question is, whether the contingent remainder given to Peter Highfield by the will of Elizabeth Glover was destroyed by the conveyance by Eunice Highfield to Peter Jackson in October, 1832. There is no doubt, that, if Eunice Highfield had had an estate for life, with a remainder or reversion in fee in herself, she might have united the two by a conveyance of the entire interest to a third person. But it is equally clear that a fee cannot be mounted upon a fee by way of remainder: and, if Eunice Highfield had not a remainder in fee, her conveyance could not have the effect of destroying the contingent remainders, and *consequently the plaintiffs, as devisees of Peter Highfield, are entitled. [*343 In Co. Litt. 143, a "remainder" is thus defined,—"Remainder, in legal Latin, is, remanere, coming of the Latin word remaneo; for

(*a*) The point marked for argument on the part of the plaintiffs, was,—"that the effect of the indentures of the 1st and 2d of October, 1832, was, only to convey to Peter Jackson the life estate of Eunice Highfield in The Asps, devised to her by the testatrix, and that the limitations of the will in favour of Peter Highfield were not affected by that conveyance."

that it is a remainder or remnant of an estate in lands or tenements, expectant upon a particular estate created together with the same at one time." It will be contended on the other side, that Eunice Highfield took a reversion in fee under the residuary devise; but, though true it is, that, if a specific devise comprises only a partial or contingent interest in lands, leaving an ulterior or alternative interest undisposed of, such undisposed of ulterior or alternative interest will pass by a general residuary devise; yet here the whole fee had already been disposed of by the devise to Eunice for life, with remainder to her children, with remainder, in default of children of Eunice, to Peter Highfield in fee. The rule is thus stated in Fearne's Contingent Remainders, 9th edit. 11,—"A residue is defined by Lord Coke, 1 Inst. 143 a, to be 'a remnant of an estate in lands or tenements expectant on a particular estate, created together with the same at one time.' It follows from this definition, that, whenever the whole fee is first limited, there can be no remainder, in the strict sense of that word; for, the whole being first disposed of, no remnant exists to limit over. Therefore, if I limit an estate to the use of A. and his heirs till C. returns from Rome, and, after the return of C., to the use of B. in fee, here, the whole fee being first limited to the use of A., there is no remnant left to limit over; and, consequently, the limitation to B. cannot be a remainder within the foregoing definition. But, where I limit an estate to the use of A. until C. returns from Rome, and, after the return of C., to the use of B. in fee; here, I do not limit the whole fee to the use of A. (as in the former case), but only a particular estate to endure till *the return of C., which being an uncertain period, such particular estate is a freehold: having, therefore, limited only a particular estate, extending in its first creation no further than to C.'s return, the residue of the estate after C.'s return is a remnant of the whole estate in the lands, expectant on that particular estate; and, if I at the same time limit this remnant to the use of B. and his heirs, it is a remainder within the express words of the above definition." In Carter *v.* Barnardiston, 1 P. Wms. 511, there was an alternative gift in fee by way of contingent remainder: and the question was, whether the second remainder could take effect so as to destroy the first. Plunkett *v.* Holmes, 1 Lev. 11, 1 Sid. 47, T. Raym. 28, and Purefoy *v.* Rogers, 2 Saund. 380, 2 Lev. 39, 3 Keble 11, were cited. The Lord Chancellor said, "that the case of Plunkett *v.* Holmes was a resolution in point, that, where the remainder in fee was devised in contingency, the fee descended to the heir until the contingency happened; and though he should admit that resolution to be extrajudicial, and not directly to the point then in question, yet the opinion of four learned judges must be of great weight, especially against the notion which was contended for by the other side; and that the case of Purefoy *v.* Rogers was equally in point, and the interruption which Lord Hale gave to Saunders, who attempted to argue there, did not proceed from any heat or impatience in Lord Hale (who was master of a great deal of temper as well as learning), but from the result of his fixed judgment and opinion, that, when, after an estate for life, the remainder in fee was devised upon a contingency, the fee-simple, not being disposed of until the contingency happened, must in the mean time descend to the heir; and, to say, that, in these cases of Plunkett *v.* Holmes and Purefoy *v.* Rogers, the

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devise over of the fee (after the contingent devise in fee) was to the *testator's right heirs, and that this distinguished it from the principal case, and made the heir take by descent, was hardly [*345 agreeable to the rules of law, for, when the testator had devised the remainder in fee upon so remote a contingency, having in that manner given a fee, he could go no further, nor devise any remainder over, and therefore in such case the devise over of the fee-simple would be void, whether made to the heir or to any other person." That, it is submitted, is precisely this case.

Joshua Williams (with whom was *Hugh Hill*), for the defendants.(*a*)—The devise to Peter Highfield was a contingent remainder, which in law is no estate at all; Montgomery *v.* Montgomery, 3 Jones & Lat. 62: the reversion in fee expectant on the death of Eunice Highfield would, therefore, but for the residuary devise, have gone to the heir-at-law of the testatrix: Heardson *v.* Williamson, 1 Keen 33. That it is competent to a testator, having this vested estate in him, to devise it to another, is clear. The residuary devise simply places the devisee in the position of heir. In 1 Jarman on *Wills, 2d edit. 550, it is said: "If the specific devise comprise only a partial or contingent interest in the [*346 lands, leaving an ulterior or alternate interest undisposed of, which would, in the absence of disposition, descend to the heir, such undisposed of interest will, even in a will made before the year 1838, pass by a general residuary devise. Thus, where a person by such a will devised certain lands to A. for life or in tail, and the residue of his lands to B. and his heirs, B. under this devise took the reversion in fee not included in the devise to A.;(*b*) and, consequently, if A. died in the lifetime of the testator, he became, at the testator's death, tenant in fee in possession." Again, at p. 551, that learned author says: "The same doctrine, it is clear, applied to executory and contingent devises in fee; for, if an estate in fee were devised to a person on the happening of a certain event, it is obvious that the alternative fee depending on the converse event is undisposed of, and therefore is an interest on which the residuary clause will operate. Thus, if a testator devised, in case his personal estate should be insufficient to pay his debts, certain lands to A. and his heirs, in trust to sell and pay them, and devised the residue of his estate to B.; the devise to B. carried the legal fee, in the event of the personal estate being sufficient to pay the debts.(*c*) So, if a testator devised real estate to A. for life, remainder to A.'s children living at his decease, in

(*a*) The points marked for argument on the part of the defendants, were,—

"That the devise to Peter Highfield in fee, for want of a child or issue of Eunice Highfield, created a contingent remainder in fee, dependent upon the life estate of Eunice Highfield:

"That the vested reversion in fee expectant upon the death of Eunice Highfield, would, but for the residuary devise, have descended on the heir-at-law of the testatrix:

"That the residuary devise comprised this vested reversion in fee, and gave it to Eunice Highfield, the tenant for life:

"That, by the indentures of the 1st and 2d of October, 1832, the life estate and reversion both became vested in Peter Jackson; and that, by the merger thus occasioned of the particular estate on which the above contingent remainder depended, the contingent remainder was destroyed."

(*b*) Citing Wheeler *v.* Walroome, Aleyn 28, 3 P. Wms. 63, n., Cooke *v.* Gerrard, 1 Lev. 212, Rooke *v.* Rooke, 2 Vern. 461, 1 Eq. Ca. Abr. 210, pl. 17, Willows *v.* Lydcot, 1 Ventr. 285, 2 Mod. 229: and also referring to Doe d. Briscoe *v.* Clarke, 2 N. R. 343, Bennett *v.* Lowe, 7 Bingh. 535, 5 M. & P. 485, and Saumarez *v.* Saumarez, 4 M. & Cr. 331.

(*c*) Goodtitle d. Hart *v.* Knot, Cowp. 43.

fee, and the residue of his lands to B., it is clear, that, if A. died, either
*347] in the testator's lifetime or after his *decease, without leaving a child surviving him, B. would be entitled under the residuary devise."(a) A further illustration of this doctrine is to be found in the case of Doe d. Wells v. Scott, 3 M. & Selw. 300. There, the testator devised "all my lands at H. to J. M.. my cousin and heir-at-law, his heirs and assigns for ever, provided that he or his heirs do within six months after my decease assure to R. M. and to his children the copyhold premises at R., and, in default thereof, to R. M. for life, and, from and after his decease, to his children living at the time of his decease, their heirs and assigns for ever, as tenants in common:" J. M. died unmarried before the devisor; and it was held that this was not a lapsed devise of the whole interest, so as to belong to the heir-at-law of the devisor, but, by reason of the contingent interest which remained undisposed of if J. M. should not assure and R. M. should die without children, the residuary devisees, to whom was devised all the rest of the devisor's lands, &c., wheresoever situate, &c., were entitled. Lord Ellenborough, in giving judgment, there said: "The law as laid down in this and the other cases to the same effect, not being disputed by the counsel on either side, it brings it to this mere question arising on the face of the will, whether, at the time of the making of the will, and upon the face of the will itself, there was any interest in the lands devised not fully disposed of; for, if there was, the consequence is, that the residuary devise must operate upon such interest." [WILLIAMS, J.—A residuary devise of personal estate covers all that is previously undisposed of: but, does that rule apply to realty? In Cambridge v. Rous, 8 Ves. 12, 25, Sir W. Grant (M. R.) says,—"It has been long settled that a residuary
*348] bequest of personal estate (for, it is *otherwise as to real) covers, not only everything not disposed of, but everything that in the event turns out not to be disposed of: not in consequence of any direct or expressed intention; for, it may be argued in all cases that particular legacies are separated from the residue, and that the testator does not mean that the residuary legatee should take what is given from him: no; for, he does not contemplate the case: the residuary legatee is to take only what is left: but that does not prevent the right of the residuary legatee. A presumption arises for the residuary legatee against every one except the particular legatee. The testator is supposed to give it away from the residuary legatee only for the sake of the particular legatee. In case of lapse of real estate, the heir-at-law takes; but, in the case of personal property, the residuary legatee is preferred either to the next of kin or the executor."] Under the old law, a residuary bequest, as to personalty, comprised lapsed legacies; but not as to realty. It is otherwise now. The subject is thus treated in 1 Jarman on Wills, 548,—"A residuary bequest, it is well known, operates upon all the personal estate of which a testator is possessed at the time of his death, and consequently includes all specific legacies which are void, or fail by the death of the legatee in the testator's lifetime; and such would undoubtedly be its operation, though all the specific legacies were in this situation, so that a bequest in terms embracing the 'residue' should become, in event, a gift of the whole. But, as, under the old testamentary law (which, it will be remembered, still applies to all wills made before the

(a) Willes 300; Doe d. Moreton v. Fossick, 1 B. & Ad. 186.

year 1838, whatever be the period of the testator's decease), a testator could only devise the real estate to which he was actually entitled at the time of making his will, it follows that every residuary devise in such a will, however general in its terms, is in its nature specific; being, in fact, a specific disposition of the lands not before *given, [*349
or, to speak more accurately, not before *expressed to be given*, by the will." In Doe d. Moreton *v.* Fossick, 1 B. & Ad. 186, a testatrix devised copyhold estates to her mother for life, then to F. and his wife for their lives, and afterwards to their children in fee: all the residue of her estates, of what kind soever, she bequeathed to her mother, her heirs, executors, &c., for ever; but she charged such residue of her estates, both real and personal, with an annuity of 20*l.* to her grandmother for life: and it was held that the reversion of the copyhold estates must pass by the residuary clause, unless a contrary intention could be collected from the will taken altogether; and that the charge of an annuity on the residue was not, under the circumstances, a sufficient proof of such intention. Lord Tenterden there says: "I take the general rule of construction to be, that all the testator has which is not otherwise disposed of, passes under a residuary clause, unless there appear from other parts of the will, when the whole is read, a clear and manifest intention that something should not pass. It is not necessary that the testator should have a particular property or interest in his contemplation when framing the residuary clause; the question is, what intention appears on the whole; and the property will pass, unless it can be shown that the testator distinctly intended otherwise." Mr. Hayes, in his Principles for Expounding Dispositions of Real Estate, p. 29, says: "If land be devised to A. for life, with remainder to his children and their heirs, and, in default of issue of A., over, the words 'in default,' &c., are referable to the designated objects of the last limitation, *i. e.*, the *children* of A., and not to an indefinite failure of his issue,—Goodright *v.* Dunham, Dougl. 264. If there be a child of A. in being at the death of the testator, the whole fee-simple vests in such child, liable to be partially divested by the coming in *esse of other children, and [*350
the devises over introduced by the words 'in default,' &c., are of course inoperative. If A. has no child in being at the testator's death, but a child afterwards comes into existence, the same effect will *then* be produced, unless in the *interval* A. has done some act to determine prematurely his particular estate of freehold; for, such a determination of that estate will, it seems, defeat all the subsequent devises, because there is no child of A. in being to take the remainder when it ought to vest, and the ulterior devisees, although *persons in being and ascertained*, cannot take *vested* estates, inasmuch as the remainder limited to the children is a *contingent* remainder in *fee-simple*. But if A. should *not* have a child in being at the testator's death, nor at any time afterwards, and his estate of freehold should *not* so determine, but naturally expire, the limitations introduced by the words 'in default,' &c., will on his death take effect, if limited to persons then in being and ascertained, as remainders. This is the result of the doctrine established by Loddington *v.* Kime, 3 Lev. 431, 1 Salk. 224, 1 Lord Raym. 203, and cases of that class." The note to that passage, at p. 81, is addressed against the case of Loddington *v.* Kime: and the learned writer places his observations upon it in a note, because he knows that the rule is too well settled to be now dis-

turbed. "According to this doctrine," he says, "'whenever a contingent remainder is limited, and is followed by another limitation over, then, if the contingent limitation be *not* in *fee*, the subsequent limitation may be vested, if it be made to a person in esse;' 'but, where there is a *contingent* limitation in *fee* absolute, no estate limited *afterwards* can be vested,' or, in other words, 'where the mesne estates limited are for life or in tail, the last remainder may, if it be to a person in esse, vest, but no remainder after a limitation in fee can be vested' (Fearne C. R., 8th edit. pp. 223, 225). In the supposed case of a remainder limited after
*351] *a contingent remainder in fee, there is said to be a contingency with a *double aspect;* a phrase of which the propriety, or at least the peculiar applicability to the limitations in question, is not very apparent, for, all contingent events may or may not happen, and, whether several remainders limited to arise in the alternative are in fee-simple, in fee-tail, or for life, the *aspect* of the contingency must be the same. The phrase, indeed, would seem rather to apply, if applicable to any case, to the contingency on which a limitation after a limitation to unborn children in *tail* depends, for in that case, the ulterior limitation is described by Lord Hardwicke (in Southby *v.* Stonehouse, 2 Ves. Sen. 610) to be made 'upon a double contingency, viz., if no children, or all die without issue.' In Loddington *v.* Kime, the contingent remainders were described to be 'not expectant upon, and to take effect the one after the other, but *contemporary*, to commence from the same period, not indeed together, but the one to take effect in lieu of the other, if that failed.' When positions are found entrenched behind hard names, and enveloped in a cloud of contradictory and unmeaning words, a suspicion is apt to arise that there may be something which requires to be screened from too close an examination. It is admitted, that, under a devise to A. for life, remainder to his children (he having none) for *life* or *tail*, remainder to B. in fee, the remainder to B., being to a person in esse and ascertained, is *vested;* but, if the contingent remainder to the children were in *fee-simple*, B.'s remainder would, conformably to the doctrine above stated, be deemed also *contingent;* and the ground of the distinction is stated to be, the different quantities of the contingent remainders to the children, the one being in fee-simple, the other for life or in tail only. But, as the *contingent* remainder confers no estate at all, but only the
*352] possibility of an estate, how *can *its* quantity affect the vesting of the alternate remainder? There cannot be two legal fees in the same land, but it is clear that a *vested* remainder in fee, and a *contingent* disposition of that remainder to take effect in a given event, may co-exist; and, indeed, whenever a contingent remainder in fee is limited, they must co-exist, for, the vested remainder in fee must reside in somebody, and the question here is, whether it shall reside in B., a person in being and ascertained, or go to the heir-at-law, or residuary legatee? To say that it cannot reside in B. because the *contingent* remainder to the children is in *fee-simple*, is to assign a cause inadequate to the effect. As that contingent remainder confers no estate, it is to affirm that B.'s remainder is prevented from vesting by a nonentity. We should appear to have as valid and satisfactory a reason, if we were told that B.'s remainder cannot vest because the remainder to the children is in joint tenancy. It should seem that the remainder to B., unless shown to be in other respects contingent, might well vest, whether the contingent

remainder to the children be in fee or for a less estate; for, being limited as a remainder immediately expectant on the freehold in A., and not as a remainder expectant on the contingent remainder, what possible difference can the quantity of the latter occasion, except that, on the happening of the contingency, if the remainder to the children be in fee, it will *wholly* divest, and, if for a less estate, only *partially* divest the remainder of B.? If the remainder to B. is not to arise till it shall be ascertained that the remainder to the children cannot arise, if it is contingent from the form of the limitation itself, then it must likewise be immaterial whether the preceding contingent remainder is in fee or not; in either case, B.'s remainder must be contingent, without reference to the quantity of that remainder. The position is, that, 'where there is a *contingent limitation in fee absolute, no estate can *afterwards* be vested (Fearne, Cont. R. 8th edit. 225); yet, if the devise [*353 which we have proposed as an example were followed by a devise of the residue of the testator's real estate to C., the remainder in fee immediately expectant on A.'s particular estate would, it seems, be held to *vest* in C., subject to be divested by the taking effect of the contingent limitations,—Doe d. Wells *v.* Scott, 3 M. & Selw. 300; and, what is this but limiting an estate after a contingent limitation in fee absolute? What is it but saying, that, in default of children of A., to which children, if any, I give the fee, I devise the land to C. in fee? And, how does this differ from what the testator had before said in respect of B.? The circumstance of the devise to C. being a residuary devise, cannot alter the case; for, *all* devises of real estate, of which the testator must be seised, are necessarily specific." At the end of his argument, the learned writer says,—"The mistake (if it be a mistake) into which the courts have fallen upon this subject, has been attended with the important consequence of enabling the first devisee, before he has a child in esse, either alone, if the vested fee be in him as heir-at-law or *residuary devisee*, or in concurrence with the owner of that fee, to destroy as well the limitation to the children as the substituted limitation (which would not otherwise be exposed to this danger), and acquire the absolute fee-simple." In Preston on Abstracts, Vol. II., 99, the same doctrine is unhesitatingly laid down. "It is also to be observed," says that learned author, "that, when the remainder is placed in contingency by will, the reversion in fee may pass by words in a residuary or specific clause;(*a*) and, for want of such disposition, the fee will *descend to the [*354 heir-at-law:(*b*) thus, A. and B., and the heir-at-law, may pass their estates for life and in fee; and the contingent fee to the survivor of A. and B. may be destroyed by the union and consolidation of the freehold with the fee." The doctrine cited from Fearne, p. 11, to show that a remainder cannot be limited upon a remainder, is not disputed; but it has no application to this case, for, here the whole fee was not disposed of in the first instance. The estate is not given to Eunice Highfield and her heirs until a certain event has happened; but a particular estate only (for life) is carved out, leaving the whole residue undisposed of: and that that residue would, but for the residuary devise, have descended to the heir-at-law, is clear. At p. 353 of the same work, it is said: "Where the inheritance is devised in contingency, it

(*a*) Rogers *v.* Gibson, 1 Ves. sen. 492; Stephens *v.* Stephens, Cas. t. Talb. 228.
(*b*) Plunket *v.* Holmes, T. Raym. 28; Purefoy *v.* Rogers, 2 Saund. 380.

descends, if not otherwise disposed of, to the testator's heir, till the contingency; as, where A. devised lands to B., his heir, for life, and, if B. should die without issue living at his death, that then the same should remain to C. in fee; but, if B. should have issue living at his death, then the fee should remain to the right heirs of B.; it was resolved that B. took an estate for life, with remainder in fee in contingency; and it was said by Wyndham and Twisden, and agreed by the other judges, that the fee descended to B., as heir, till the contingency happened, though not so as to confound his estate for life, and was not in abeyance; that, in relation to C., B. took only an estate for life; but, in the mean time, by operation of law, he had the fee in such sort as that there should be an hiatus to let in the contingency when it happened:" Plunket v. Holmes, 1 Lev. 11, T. Raym. 28, 1 Sid. 47. Crofts v. Middleton, *355] 2 Kay & J. *194, is the converse of this case: there, the testator devised real estate to A. for life, remainder to the children of A. in fee, with a provision for survivorship and accruer in case of the death of any or either of such children under the age of twenty-one years and without issue, and, if there should not be any child of A., or if any or all such children should die under twenty-one and without issue, to the heirs and assigns of A.; and, although A. had no child at the date of the will or at the death of the testator, it was held that the gift to the heirs of A. was a contingent remainder. [COCKBURN, C. J.—Your contention is, that the estate for life merged in the remainder in fee?] The moment the two estates vested in the same person after the death of the testatrix, the life estate merged in the remainder in fee. All the authorities are collected in the notes to Purefoy v. Rogers, 2 Wms. Saund. 380. Carter v. Barnardiston, 1 P. Wms. 505, is in effect the same case as Loddington v. Kime, 1 Salk. 224, 1 Lord Raym. 203, 3 Lev. 431, 3 Bro. P. C., Toml. edit. 64.

Shapter, in reply, referred to Co. Litt. 18 a, n. (4), Fearne 225, and Plowden 239.

COCKBURN, C. J.—I am of opinion that the defendants are entitled to the judgment of the court. The action is brought to try the right to property devised by the will of one Elizabeth Glover, who died seised in fee-simple. The devise was to the testatrix's niece Eunice Highfield, for life, with remainder to her children in such shares as she should appoint, with remainder, in default of issue of Eunice, to her nephew, Peter Highfield, in fee. And the will contained a residuary clause, whereby the testatrix gave and bequeathed all the residue and remainder *356] of her estate and effects, whatsoever and wheresoever, not *thereinbefore disposed of, unto her said niece Eunice Highfield, her heirs and assigns, for ever. It appears, that, after the death of the testatrix, Eunice Highfield, by lease and release of the 1st and 2d of October, 1832, conveyed the premises in question to one Peter Jackson, in fee; and the question is, whether that is a valid conveyance, or whether the testatrix's nephew Peter Highfield,—Eunice Highfield, the tenant for life, having died without issue,—became entitled to the estate. That question turns upon whether by the conveyance to Jackson the life-estate of Eunice Highfield became merged in the reversion, so that, by the failure of the particular estate upon which the contingent remainder of Peter Highfield depended, the contingent remainder was destroyed. I am of opinion that that is the true state of things. The

testatrix first creates a life estate in Eunice Highfield, and then gives a contingent remainder to Peter Highfield, leaving the reversion in fee undisposed of, except for the residuary clause. It is clear that the fee thus undisposed of must have remained somewhere, and that it was not the mere shadowy interest which Mr. *Shapter* by his very ingenious argument sought to persuade us. The fee, then, being somewhere, what would become of it? If it had remained undisposed of, it would have gone to the heir-at-law of the testatrix. But we find that the testatrix by the residuary clause professes to dispose of it: for, she thereby gives all the residue and remainder of her estate not before disposed of, to her niece, in fee. If, therefore, the fee did not pass,—as, I think, it did not,—by the creation of the contingent estate, then it would appear to follow that it must be included in the residuary devise, the words of which are large enough to embrace it: and, that being so, the effect of the conveyance of 1832 was, to pass not only the life estate but also the reversion, and, by the merger of the particular estate, on which the *contingent remainder depended, in the reversion, to destroy the contingent remainder. The only difficulty suggested upon this, [*357 was, whether an estate of this kind must not be made the subject of a specific devise. No authority, however, was cited for that proposition: and, primâ facie, and upon the reason of the thing, if a testator leaves the fee undisposed of by the earlier part of his will, and by a residuary clause professes to deal with "all the residue and remainder of his estate and effects whatsoever and wheresoever, not thereinbefore disposed of," it follows as of course that the fee passes by that. It was said, that, although this would be so as to *personalty*, a different rule prevails as to *realty:* but no authority was cited in confirmation of that view: and we have the authority of two very eminent conveyancers,—Mr. Preston and Mr. Hayes,—who seem to take it for granted that *all* estates previously undisposed of by the will pass by the residuary clause. I am therefore of opinion, that, there being this estate of fee in the testatrix, which, unless disposed of, would have passed to her heir-at-law, and she having disposed of it by the residuary clause in terms capable of passing it, and the estate for life and the reversion in fee being thus united in Eunice Highfield, and she having conveyed the whole of her interest to Peter Jackson, the particular estate became merged in the fee, and the contingent remainder in favour of Peter Highfield was consequently destroyed. For these reasons, I think there must be judgment for the defendants.

WILLIAMS, J.—I am entirely of the same opinion. The learned counsel who argued for the plaintiffs rested his case upon the position that the residuary clause in the will could not operate as a devise of the reversion in fee, because it would be a violation of the rule of law that a fee cannot be limited on a fee. The obvious *meaning of that is, that, where an estate is so devised that the fee, whether absolute or determinable, is vested in the first taker, the subsequent dispositions cannot be good by way of remainder, but must operate by way of executory devise. And that is reasonable, because, the fee having been given and passed by the first devise, there is nothing further for the subsequent limitations to operate upon. But that rule is wholly inapplicable to a case like this, where all is in contingency, and the fee is outstanding. If the fee be outstanding, where is it? It is clear that the notion of the fee being in abeyance cannot now be sustained: see Pure- [*358

foy *v.* Rogers, 2 Wms. Saund. 380, 2 Lev. 39, 3 Keble 11; Plunkett *v.* Holmes, 1 Lev. 11, 1 Sid. 47, T. Raym. 28; Carter *v.* Barnardiston, 1 P. Wms. 511: but the fee descends to the heir-at-law, to let in the contingency if it happens. I think it is clear, that, if the will had contained no residuary clause, the fee would have descended to the heir-at-law. The question, then, resolves itself into this, whether the residuary clause passes this reversion in fee which but for such residuary clause would have descended to the heir-at-law. Some passages have been cited from the works of two very eminent conveyancers, which treat it as quite plain that such an estate would pass by a residuary clause. The estate for life did not merge in the fee so long as both remained in the devisee: but they both became united by the conveyance to Peter Jackson. I therefore think the defendant is entitled to our judgment.

The rest of the court concurring,

Judgment for the defendants.

It is a familiar rule that the law presumes against intestacy; for it is hardly to be supposed that any one, in making a general disposition of his property, means to except any part thereof, unless he says so in express terms. Therefore, it is constantly held, as in the principal case, that a residuary devise, in the ordinary terms, carries with it not only the property of the testator in which no interest is devised or bequeathed, in other parts of the will, but also all reversionary and contingent interests in property, which, in events contemplated by him, are not otherwise disposed of: O'Neale *v.* O'Neale, 3 Harr. & McHen. 93; Haydon *v.* Stoughton, 5 Pick. 528; Reeves *v.* Reeves, 1 Dev. Ev. 386; Craig *v.* Craig, 3 Barb. Ch. 76; Den *v.* Coeveling, 1 Dutch. 449. Yet in Hansell *v.* Hubbell, 24 Penn. St. 244, this rule seems to have been disregarded, and the word "residue" held to be "presumed to refer to other real and personal estate not before mentioned in the will."

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*359] *INSULL and Wife *v.* MOOJEN. *Nov.* 24.

Where a reference is made to the master by judge's order under the 3d section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), he must proceed with the inquiry, even though a question of fraud should incidentally arise before him.

By an order of the 19th of July, 1856, made upon a petition in chancery on behalf of the plaintiff Margaret Ellen Insull (then Margaret Ellen Chace, spinster), in a suit wherein the said Margaret Ellen Chace (a pauper) was plaintiff, and Thomas Redfern and others were defendants, it was amongst other things ordered that the defendant Redfern should, on or before the 31st of July, 1856, pay 750*l.* to the petitioner, on behalf of herself and three other parties. The money was duly paid by Redfern, and received by one Moojen (who as clerk to the petitioner's attorney had had the management of the suit). It was afterwards agreed between the parties interested in the fund that the petitioner should receive 450*l.* of it, and the other three parties each 100*l.*, and that the costs should be defrayed out of the petitioner's share. This agreement was carried into effect,—Moojen retaining 150*l.* for costs,

including counsel's fees and court fees;(a) and the petitioner (*then being the wife of Insull*), upon Moojen's representation that that sum was fairly due for costs, though no bill was delivered, signed the account produced to her as settled and approved. Conceiving that they had been cheated in the transaction, this action was brought to recover back the 150*l.*; and upon the application of the defendant, the following order was made by Willes, J., on the 1st of July last:—

*"Upon hearing the attorneys or agents on both sides, I do [*360 order that this cause be referred to the certificate of one of the masters of this court under the statute 17 & 18 Vict. c. 125, with all the powers as to certifying, of a judge at Nisi Prius; the costs of the cause to abide the event; the costs of the reference to be in the discretion of the master; and that the plaintiffs shall be at liberty within two days to amend their particulars of demand."

The parties attended before the master on the 8th of July last, when, the counsel for the plaintiffs having opened his case and referred to the statement of account signed by the plaintiff Margaret Ellen Insull, the master at once decided that there was an end of the case, and declined to hear any explanation of the circumstances under which the account was so signed; and he afterwards gave the following certificate:—

"I certify that there is nothing due from the defendant to the plaintiffs; and that the plaintiffs do pay to the defendant his costs of this reference and certificate, 21st July, 1857."

Gibbons, on a former day in this term, obtained a rule calling upon the defendant to show cause why the certificate should not be set aside, on the ground of misconduct on the part of the arbitrator, in having held that an account stated with the plaintiff's wife was conclusive evidence, and in having refused to go into the account, and in having refused to hear evidence impeaching the accuracy of the account; and on the ground set forth in the affidavit; and also on the ground that the case was not matter of account within the meaning of the statute. He submitted that the signature of the plaintiff's wife to the account did not preclude the master from going into evidence to show that it had been obtained by fraud.

**David Keane* showed cause.—Upon the production of the [*361 account signed by the female plaintiff as settled and approved, the master very properly held that the plaintiffs' case failed. [CROWDER, J.—It was only primâ facie evidence, not conclusive.] If the plaintiffs conceived that more was involved than mere matters of account, that should have been stated to the judge when the order under the statute was applied for. The master thought he had no jurisdiction to try the question of fraud. [WILLES, J.—When an order is made under the statute, the arbitrator must proceed: he cannot be allowed to set himself up as a court of appeal from the decision of the judge.]

Gibbons was not called upon to support his rule.

COCKBURN, C. J.—I think this case must go back to the master, the judgment signed upon his certificate standing as a security for what he may find to be due. The order having been made referring the matter

(a) The affidavit filed in answer to the rule, stated, that, on the petition coming on to be heard, the Vice-Chancellor (Sir Page Wood) directed that the court fees should be paid, the suit having by the compromise ceased to be a pauper suit, and that they were accordingly paid.

to the master, whatever might arise incidentally in the course of the inquiry before him,—even if it were a case of fraud,—he was bound to go into, though it might not be strictly matter of account. If there had been any reason for thinking that the matter was not a fit one for a reference to the master, that should have been suggested when the application was made for the order. But, the order having been made, it clearly was the master's duty to proceed with the inquiry, and dispose of the whole matter.

WILLIAMS, J.—I am of the same opinion. When an order is made under the statute, referring the matter to the master or other arbitrator, it is his duty to proceed with the inquiry just in the same manner as if
*362] it had *been a reference under a judge's order before the passing of the Common Law Procedure Act.

CROWDER, J.—I am of the same opinion. The cause having been referred to him, the master ought to have proceeded with it. The master has evidently misapprehended the effect and intention of the statute.

WILLES, J.—I am entirely of the same opinion. The master has fallen into a mistake as to the effect of the reference clauses of the Common Law Procedure Act, 1854; and in this he does not stand alone. It is very desirable that this erroneous impression should be corrected. If the jurisdiction of the court or judge under these sections was to depend upon the fact of the matter in dispute consisting wholly or in part of matters of mere account, and after an inquiry before the arbitrator or master it should turn out that they did not so consist, the whole proceedings would have fallen to the ground. But the legislature have carefully guarded against such injustice, by providing in § 3 that the order to refer may be made "if it shall appear to the satisfaction of the court or a judge that the matter in dispute consists wholly or in part of matters of mere account," and again in § 6, that "if upon the trial of any issue of fact by a judge under this act, it shall appear to the judge that the questions arising thereon involve matter of account which cannot conveniently be tried before him, it shall be lawful for him, *at his discretion*, to order that such matter of account shall be referred," &c., —so that it is for the court or the judge to determine in the first instance whether or not the matter is fit to be referred. The order being made, it is the duty of the arbitrator or the master to proceed to act upon it, and not to canvass the propriety of the order. That clearly is no part
*363] of his duty. I have thought it *necessary to say thus much, though, in the present case, I think the matter which was before the master was strictly and properly matter of account. It did not cease to be a matter of account because one party sought to impugn the correctness of the account produced by the other. The rule must be made absolute, but without costs.

Rule absolute accordingly.(*a*)

(*a*) That the certificate be set aside without costs, and the cause referred back to the master upon the terms and in the manner mentioned in the order of the 1st of July, 1857.

BAYNE *v.* SLACK. *Nov.* 25.

A writ of summons issued under the 18th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), was served on the 17th of September upon a British subject residing out of the jurisdiction (at Jersey): on the 27th of October, the plaintiff obtained an order for leave to proceed, and filed a declaration on the 28th, charging the defendant with a breach of promise of marriage; but the affidavit upon which the order was obtained was not so framed as to bring the case within the statute.

Semble, that the propriety of the order might be impeached on that ground.

But, held, that, in order to take advantage of the irregularity, it was incumbent on the defendant to apply within a reasonable time, according to the exigency of the 135th rule of Hilary, 1853; and that the irregularity was waived by taking the declaration out of the office.

On the 12th of September last, a writ of summons in the form given by the 18th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), issued against the defendant, a British subject residing in the island of Jersey,—without any special endorsement, or anything on the face of it to show the nature of the cause of action,—and was duly served there (on the defendant personally) on the 17th. No appearance having been entered for the defendant pursuant to the exigency of the writ, an order was made by Martin, B., on the 27th of *October, [*364 giving the plaintiff liberty to proceed by filing a declaration.(*a*)

The affidavit upon which the order was obtained was as follows:—"That I (the plaintiff) am unmarried, and the defendant is a widower, residing at Briton Lodge, Bagot, in the island of Jersey, and that the said defendant, in the month of June, 1855, and afterwards, [*365 *proposed to marry me, and thereupon I and the defendant agreed to marry one another: and I say that I have hitherto been ready and willing to marry the defendant, but the said defendant hath not married me, according to his promise."

The declaration was filed on the 28th of October, and was as follows:—

"Isabella Bayne, by, &c., sues Thomas Furnell Slack, For that the plaintiff and defendant agreed to marry one another, and a reasonable time for such marriage has elapsed, and the plaintiff has always been ready and willing to marry the defendant, yet the defendant has neg-

(*a*) The 18th section of the Common Law Procedure Act, 1852, enacts, that, "in case any defendant, being a British subject, is residing out of the jurisdiction of the said superior courts, in any place except in Scotland or Ireland, it shall be lawful for the plaintiff to issue a writ of summons in the form contained in the schedule (A.) to this act annexed, marked No. 2, which writ shall bear the endorsement contained in the said form, purporting that such writ is for service out of the jurisdiction of the said superior courts; and the time for appearance by the defendant to such writ shall be regulated by the distance from England of the place where the defendant is residing; *and it shall be lawful for the court or judge, upon being satisfied by affidavit that there is a cause of action, which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction, and that the writ was personally served upon the defendant, or that reasonable efforts were made to effect personal service thereof upon the defendant, and that it came to his knowledge, and either that the defendant wilfully neglects to appear to such writ, or that he is living out of the jurisdiction of the said courts in order to defeat and delay his creditors, to direct from time to time that the plaintiff shall be at liberty to proceed in the action in such manner and subject to such conditions as to such court or judge may seem fit, having regard to the time allowed for the defendant to appear being reasonable, and to the other circumstances of the case:* Provided always, that the plaintiff shall and he is hereby required to prove the amount of the debt or damages claimed by him in such action, either before a jury upon a writ of inquiry, or before one of the masters of the said superior courts in the manner hereinafter (s. 94) provided, according to the nature of the case, as such court or judge may direct; and the making such proof shall be a condition precedent to his obtaining judgment."

lected and refused to marry the plaintiff: and the plaintiff claims 3000*l.*"

Endorsed on the declaration was a notice to plead in twenty-one days, otherwise judgment.

On a former day in this term (Nov. 17) *and after the defendant's attorney had taken the declaration out of the office*,—upon an affidavit of the attorney, that "no copy of the order giving the plaintiff liberty to proceed had been served on the defendant, his attorney or agent, to the best of the deponent's knowledge and belief, and that he (the deponent) had not seen the order or any copy thereof,"

Field obtained a rule calling upon the plaintiff to show cause why the writ of summons, the order, and all subsequent proceedings should not be set aside for irregularity. He submitted that the affidavit upon which the order was obtained was insufficient, inasmuch as it contained no statement that the alleged promise was made within the jurisdiction of the court, or that the defendant was within the jurisdiction. [COCKBURN, C. J.—If the contract is ambulatory, and the defendant a British subject, is it not within the jurisdiction?] It is submitted that it is not.

*366] **Joyce* now showed cause upon an affidavit of the plaintiff's attorney stating that he forwarded the declaration on the 28th of October to his agent in Jersey, together with a copy of the order of Martin, B., for service upon the defendant; that his said correspondent, on the 12th of November instant, wrote to him that he had duly served the said notice and copy of the order at the defendant's lodgings in the Crescent, Jersey, by leaving the same with the defendant's servant there; and that the deponent verily believed his said correspondent's statement to be true. The application is too late; and for this there is an express authority upon this very section,—Hutton *v.* Whitehouse, 1 Hurlst. & N. 32.† There, a British subject residing out of the jurisdiction, having been served with a writ of summons under s. 18, and not having appeared, a judge's order was made that the plaintiff should be at liberty to proceed: judgment was signed on the 28th of November; and on the 12th of March the defendant applied to set aside the proceedings, on the ground that the cause of action did not arise within the jurisdiction of the court: and it was held that the judge's order was not *void*, and that the application was too late. Martin, B., there says: "The defendant should have come within a reasonable time. By Reg. Gen. H. 1853, r. 135 (13 C. B. 34 (E. C. L. R. vol. 76)), no application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time.(*a*) By the 18th section of the Common Law Procedure Act, 1852, power is given to the court or a judge to direct that the plaintiff shall be at liberty to proceed with the action on being satisfied that the cause of action arose within the jurisdiction. If the judge is satisfied, surely there is jurisdiction. It is no

*367] *new jurisdiction, merely a new process." [WILLES, J.—The 18th section says that it shall be lawful for the court or judge to make the order to proceed, "upon being satisfied *by affidavit* that there is a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction," &c. Here, the learned judge was not satisfied "by affidavit," for the affidavit is such that no one *could* have held it sufficient.] It is left to the discretion of

(*a*) "Nor if the party applying has taken a fresh step after knowledge of the irregularity."

the judge. All that the statute requires, is, that the judge should be satisfied; it is not necessary that the fact should exist. [COCKBURN, C. J.—Exception may be taken to the jurisdiction, by way of appeal.] Here, the defendant was personally served with the writ of summons at Jersey on the 17th of September, 1857: the order to proceed was obtained on the 27th of October, and no application was made to the court until the 17th of November. [WILLIAMS, J.—When was the order served?] It does not appear. [COCKBURN, C. J.—The suggestion on the part of the defendant is, that it was never served at all. If it *had* been served, the plaintiff might have said so in his affidavit.] Then, the defendant has submitted to the jurisdiction. In Forbes *v.* Smith, 10 Exch. 717,† a British subject residing in France was there served with a writ of summons in the form prescribed by the 18th section of the Common Law Procedure Act, 1852. The writ was specially endorsed with a claim in respect of promissory notes made at Calcutta. *The defendant appeared to the writ*, and, after declaration, found that the cause of action did not arise within the jurisdiction of the court, and was not in respect of the breach of a contract made within the jurisdiction; whereupon he applied to set aside the writ and proceedings under it: and it was held, that there was no irregularity in the writ itself, and that the defendant, by appearing, had given the court jurisdiction. And *Parke, B., said: "The writ is perfectly regular. The statute [*368 does not require either a statement in the writ itself, or an affidavit before issuing it, that the cause of action arose within the jurisdiction of the superior courts. Therefore, there is no irregularity in the writ itself, although the substituted mode of proceeding under it could not be applied unless the cause of action arose within the jurisdiction of the court, or was in respect of a breach of contract (*a*) made within the jurisdiction. But then the defendant has *appeared;* and I think that, after appearance, this application cannot be granted. It is indeed said that the defendant appeared because he could not, until declaration, tell what the plaintiffs were going for. If so, the motion ought not to have been to set aside the writ, but the appearance, on the ground that it was entered improvidè. I will not say that in this case such an application would have been successful, because the endorsement on the writ gives information to the defendant that the cause of action arose in Calcutta. At all events, the defendant ought not to have appeared, and, having done so voluntarily, he has given the court jurisdiction. I agree, that, before declaration, there may be difficulty in knowing whether the cause of action in respect of which the plaintiff is suing arose abroad or in this country; but that may be obviated by application to a judge for particulars." Here, the defendant has not appeared; but he has taken the declaration out of the office; and that, according to Caswall *v.* Martin, 2 Stra. 1072, which has never been overruled, cures all defects in the process. [COCKBURN, C. J.—We must hear what Mr. *Field* has to say upon the subject of the waiver.]

Field, in support of his rule.—There can be no waiver *with- [*369 out knowledge or means of knowledge of the irregularity to be waived. The writ was general, and gave the defendant no information as to the nature of the alleged cause of action. Until explained by the

(*a*) "The breach of a contract."

declaration, the defendant could not know that it was sought to charge him in respect of the breach of a contract made out of the jurisdiction. [COCKBURN, C. J.—In Forbes v. Smith, 10 Exch. 717,† the objection was to the writ itself. Here, the writ only becomes bad by matter ex post facto. That certainly distinguishes the cases. WILLES, J.—The rule 135 of Hilary, 1853, says that the proceedings shall not be set aside "if the party applying has taken a fresh step after knowledge of the irregularity." The defendant does not tell us whether he had such knowledge or not.] He was never served with the order to proceed. [WILLES, J.—He clearly had the means of knowledge: for, the affidavit upon which the order was made must have been filed.(a) CROWDER, J. —You appear for the defendant, and yet you have no affidavit from him negativing the service of the order or stating that he was out of the jurisdiction of the court when the promise was alleged to have been made or broken.] The plaintiff's affidavit at least shows that the order was served out of the jurisdiction.

COCKBURN, C. J.—The general rule is, that taking a step with knowledge or the means of knowledge of a previous irregularity, operates as a waiver. If the client or his attorney had sworn that he was in ignorance as to the nature of the alleged cause of action when the declaration was taken out of the office, this might have formed an exception to the general rule. But there is nothing to show that the defendant's attorney when he took out the declaration had not seen the affidavit *370] upon *which the order was obtained. At all events, he had the means of informing himself of its contents. If he had the means of knowing what that document would have shown him, he has waived the irregularity. The rest of the court concurring,

Rule discharged, the plaintiff's costs to be costs in the cause.

(a) It ought to have been; but in this case it *was not filed.*

BENNETT and Others v. HERRING. *Nov.* 6.

Quære, whether the assignee of the reversion can avail himself of a forfeiture arising out of a breach of a covenant to complete the premises demised (in carcase) within a given time,—a breach having been incurred before the assignment to him?

A lease was granted of a piece of land with two messuages thereon in course of erection, with a covenant by the lessee to complete the messuages within two months, *and also* to keep "the said messuages or tenements and premises in repair during the term,"—with a proviso for forfeiture for breach of any of the covenants. The premises never were finished, and were much dilapidated:—Held, that a forfeiture was incurred by the breach of the covenant *to repair,* in respect of which forfeiture the assignee of the reversion might sue.

THIS was an action to recover the possession of two plots or pieces of ground, two messuages, four out-buildings, with the appurtenances, situate and being in Northumberland Park, Tottenham, in the county of Middlesex.

The action was brought by the assignees of the reversion, under the proviso for re-entry contained in a lease.

The cause was tried before Crowder, J., at the first sitting at Westminster in Trinity Term last. By lease of the 15th of June, 1853, made between Charles Ansell of the first part, Benjamin Chandler of

the second part, and James Stephen Herring (the defendant) of the third part, it was witnessed, that, in consideration of the defendant (the lessee) having erected the messuages thereinafter demised, and of the rent and covenants thereinafter reserved and contained, the lessor, at the *request of Chandler, testified, &c., demised unto the lessee, all that plot or parcel of ground, &c., together with the messuages or tenements then lately erected and built thereon, &c., to hold the same unto the lessee, his executors, administrators, and assigns, for the term of ninety-nine years from the 24th of June, 1851, at the rent of a pepper-corn for the first thirty months, and at the yearly rent of 7*l.* for each of the said two messuages during the remainder of the term. The lease contained, inter alia, a covenant by the lessee that he would, at his own costs and charges, within two calendar months from the date of the lease, finish and complete in all respects fit for habitation and use, and in a good and workmanlike manner, with sound and proper materials, the said two several messuages, with suitable and proper offices thereto, and the necessary sewers, drains, fences, walls, pavements, railings, and other things; *And also* should and would, at his and their own costs and charges, when, where, and as often as need should be during the said term, well and sufficiently repair, maintain, paint, pave, scour, empty, cleanse, amend, and keep the said messuages or tenements and premises, and all the party and other walls thereof, and all the glass and other windows, window-shutters, doors, locks, fastenings, partitions, ceilings, floors, chimney-pieces, shelves, water-closets, cisterns, pavements, privies, fences, sinks, drains, sewers, watercourses, ways, paths, and passages thereto belonging, or which thereafter should belong to the same, with all necessary reparations, paintings, cleansings, and amendments whatsoever. The lease also contained the usual covenant to paint the exterior wood and iron-work once in every three years, and a proviso, that, in case of the breach, non-performance, or non-observance of all or any of the covenants therein contained on the part of the lessee to be performed, observed, and kept, it should be *lawful for the lessor, his heirs or assigns, to re-enter upon the said premises, and the same to have again as in his or their former estate. [*371 [*372

By indentures of the 10th of August, 1854, Ansell conveyed the premises in fee to Chandler, subject to the lessee's interest.

On the 11th of August, 1854, Chandler mortgaged to Feltham and others, subject to the lease.

On the 1st of August, 1856, Feltham and others assigned to the plaintiffs, subject to the lease.

At the time of the grant of the lease of the 15th of June, 1853, the two messuages were in carcase only, but roofed in; and they never were finished. And it was proved, that, at the time the action was brought, the roofs were much dilapidated. Rent had been received under the lease after the expiration of the two months within which the messuages were by the covenant to have been completed.

On the part of the defendant, it was insisted that the right of entry for condition broken was not assignable or assigned to the plaintiff, that the forfeiture in respect to the non-completion of the messuages had been waived by the lessor's acceptance of rent, and that the covenant to repair did not attach until the premises had been completed.

A verdict having been found for the plaintiff, the points made being reserved,

Honyman, in Trinity Term last, obtained a rule nisi to enter a verdict for the defendant, or a nonsuit, on the grounds,—"first, that the right of entry for a condition broken is not assignable,—secondly, that such right of entry had been waived by the lessor,—thirdly, that such right of entry was not assigned to the plaintiffs,—fourthly, that the covenant to repair did not attach." He referred to Hunt *v.* Bishop, 8 Exch. 675,† and Hunt *v.* Remnant, 9 Exch. 635.†

*373] *F. Edwards* now showed cause.—It may be conceded that a right of re-entry for condition broken is not assignable. If the covenant to complete the messuages within two months was exhausted at the expiration of the two months, the assignee would have no right to avail himself of that forfeiture: but, if it be (as it is submitted it is) a continuing covenant, to finish the houses during the term, then there is a continuing breach, in respect of which the assignee might sue. [CROWDER, J.—There was a complete breach of the covenant before the assignment to the plaintiffs.] There was. Suppose no time had been limited by the covenant for the completion of the houses, the lessee would not have had the whole term for the purpose: the law would have implied a reasonable time. All that this covenant does, is to fix upon two months as a reasonable time for the purpose. It is a covenant which runs with the reversion. The cases cited have no application. In Hunt *v.* Bishop, there was no question whether the breach was a continuing one or not: and in Hunt *v.* Remnant, all that was decided was, that the assignment did not show any intention, or use sufficient words, to pass a right of entry. If this be held not to be a continuing breach, the consequence will be that the lessor must, in all cases of building leases, insist upon the covenant to erect and complete being strictly performed within the time limited. Then, as to the alleged waiver, it was distinctly held in Doe d. Boscawan *v.* Bliss, 4 Taunt. 735, that a lessor who has a right of re-entry reserved on breach of a covenant not to underlet, does not, on waiving his re-entry on one underletting, lose his right to re-enter on a subsequent underletting; (*a*) nor, by waiving his right to re-enter on a

*374] breach of a covenant *to repair, does he waive his re-entry on a subsequent want of repairs. [COCKBURN, C. J.—You need not labour that point.] Then, as to the covenant to repair,—it is said that cannot attach until the premises were completed. That argument, if allowed to prevail, would have this absurd consequence, that the lessee's failure to perform one covenant would form an excuse for his breach of another and independent covenant. [WILLES, J.—The covenant now under consideration, is, to repair that which is demised. CROWDER, J. —It was proved that the roofs of the carcases were out of repair and ruinous.] The lessee was at all events bound to keep the premises in repair such as they were. He was, moreover, bound under this covenant to put them in repair.

Honyman, in support of the rule.—Hunt *v.* Bishop and Hunt *v.* Remnant are distinct authorities to show that the right of entry for condition broken is not assignable: and here there was a complete breach of the covenant to complete the messuages before the assignment

(*a*) Unless the first underletting was by license; for, then, the forfeiture once waived, the condition is gone for ever. Dumpor's Case, 4 Co. Rep. 119.

to the plaintiffs. [WILLIAMS, J.—Does not the covenant to repair equally apply to the premises though unfinished? The lessee covenants to keep the "messuages" in repair, and that is a covenant which runs with the reversion: carcases are messuages.] The lessee is to complete the messuages, *and also* to keep them in repair, that is, when completed. The whole forms in effect one covenant. [CROWDER, J.—Your construction makes it necessary to insert the words, "when completed." COCKBURN, C. J.—Is it any answer to an action for a breach of the covenant to repair, for the lessee to say that he is absolved from the consequences of that breach, because he has failed to perform another covenant?] The construction contended for does not oust the plaintiffs of all remedy: it only operates to bar the forfeiture: the plaintiffs may still sue for the breach *of the first covenant,—supposing the two covenants to be divisible. [*375

COCKBURN, C. J.—It is unnecessary to decide the first question. There having been a clear breach of the covenant to repair, the plaintiffs are entitled to retain their verdict.

WILLIAMS, J.—I also am clearly of opinion that the right of entry in respect of the breach of the covenant to repair is perfect.

CROWDER, J.—At the trial I was inclined to agree with the defendant's view as to the first covenant, though I cannot say I am disposed now to adhere to that opinion. It is, however, quite clear that the covenant to repair has been broken.

WILLES, J.—It is perfectly clear that the covenant to repair applies to the messuages as demised. I must confess I should have thought that the former covenant ran with the land in favour of the assignee of the reversion. It is enough, however, for the present purpose to decide the other point. The rule must be discharged. Rule discharged.

*REGISTRATION APPEALS. [*376

(UNDER 6 & 7 VICT. c. 18).

County of GLAMORGAN.

PHILIP DAVIES, Appellant, THOMAS HOPKINS, Respondent.

Nov. 16.

The sufficiency of a notice of claim under the 6 & 7 Vict. c. 18, s. 4, is for the overseers; and, where they have acted upon it, by inserting the claimant's name in their list, pursuant to s. 5, it is not competent to the revising barrister to inquire whether its form is in compliance with the statute.

Whether such notice requires the *personal* signature of the claimant,—*quære?*

AT a court holden for the revision of the lists of voters for the county of Glamorgan, at Neath, Philip Davies, of Cattle Street, Neath, duly(*a*) objected to Thomas Davies, whose name appeared on the list of claimants for the hamlet of Coedfrank, in the said county, and proved that he gave the notices required by the 6 & 7 Vict. c. 18, and called upon the

(*a*) The case ought upon the face of it to show that the party objecting is entitled to object,—that he is on the register of voters: see 6 & 7 Vict. c. 18, ss. 7, 17.

revising barrister to require proof that Thomas Davies gave due notice of his claim to the overseers of the said hamlet.

The revising barrister doubted whether he had power to require such proof from the claimant, when his name had been inserted and published in the list: but, assuming that he had such power, he required him to prove his notice of claim; and thereupon a notice of claim in proper form, and corresponding with the entry in the list, was produced and proved to have been delivered to the overseers in due time; but the claimant's name at the foot of the notice was not written by him, but by another at his request.

*377] The revising barrister held this notice sufficient; and, *the claimant having proved his qualification as stated in the list, to his satisfaction, he retained his name thereon.

The questions for the opinion of the court were,—first, whether the revising barrister ought to have put the claimant to proof of his claim,—and, if so, secondly, whether the notice of claim was sufficient.

The validity of the claims of three other persons on the same list having been determined by the revising barrister on the same points of law, their cases were consolidated with the principal case.

If the court should be of opinion that the revising barrister ought to have required proof of the notice, and that the notice was insufficient, the list of the said hamlet of Coedfrank was to be amended, by striking out the names of Philip Davies and the said three other persons.

Kinglake, Serjt., for the appellant.—Two questions are presented for the opinion of the court,—one, whether a notice of claim under the 4th section of the 6 & 7 Vict. c. 18, requires the *personal* signature of the party claiming,—the other, whether the fact of the overseers having published the list with the party's name therein raises a presumption that it is properly put there, so as to preclude any inquiry as to the sufficiency of the notice. 1. The 4th section of the act requires the notice of claim to be *signed by the party*. It enacts "that the overseers of the poor of every parish and township shall, on or before the 20th of June in every year, publish a notice according to the form numbered 2 in the schedule (A.), having first signed the same, requiring all persons entitled to vote in the election of a knight or knights of the shire to serve in parliament in respect of any property situate wholly or in part within

*378] such parish or township, who *shall not be upon the register of voters then in force, and also all persons so entitled as aforesaid, who, being upon such register, shall not retain the same qualification or continue in the same place of abode as described in such register, and who are desirous of having their names inserted in the register about to be made, to give or send to the said overseers, on or before the 20th of July then next ensuing, a notice in writing, *by them signed*, of their claim to vote as aforesaid; and every such person, and any person who, being upon such register, may be desirous to make a new claim, shall, on or before the said 20th of July, deliver or send to the said overseers a notice, *signed by him*, of his claim, according to the form of notice set forth in that behalf in the said form numbered 2, or to the like effect." The 7th section, which provides for the notice of *objection*, in like manner requires that "every such notice of objection shall be signed by the party so objecting as aforesaid:" and this, it has been held, must be the *personal* signature of the objector himself: Toms, app., Cuming, resp.

8 Scott N. R. 910, 7 M. & G. 88 (E. C. L. R. vol. 49), 1 Lutw. Reg. Cas. 200,—decided upon the authority of Hyde *v.* Johnson, 2 N. C. 776 (E. C. L. R. vol. 29), 3 Scott 289. [COCKBURN, C. J.—Is it not enough that the revising barrister has before him the list of claimants prepared by the overseers? Must he call for proof of notice in each case?] A proper notice of objection having been given, the whole title of the claimant to have his name upon the register is put in issue. [CROWDER, J.—Was Hyde *v.* Johnson cited with approbation in Toms, app., Cuming, resp. ?] It was referred to by Cresswell, J., during the argument, and is noticed by Tindal, C. J., in the considered judgment of the court. "The natural meaning of the words," says that learned judge, "is, that there shall be a *personal* signature. And there is great reason and good sense in such an enactment. If the objector were *unknown, [*379 and was at liberty to get some one else to sign the notice, there might be great difficulty in obtaining costs from him. Some shuffling person might be put forward in his stead; and great inconvenience and vexation might be the result. The case of Hyde *v.* Johnson corroborates the propriety of this interpretation of the clause in question. 2. The next question is, whether, a notice of claim having been sent in, and published by the overseers, the claimant may not still be called on to prove his notice of claim as part of his title to be on the register. By the 3d section, the clerk of the peace is directed to send to the overseers his precept requiring them to give notice to all persons entitled to vote, to come in and make their claims. By s. 2, the overseers are directed to issue a notice to that effect in the form given in the schedule, and thereupon the claimants are to forward them the notice already mentioned. Then by s. 5 the overseers are required to prepare a list of such claimants; which list (by s. 6), together with the copy of the register of the preceding year, is to be deemed to be the list of voters of such parish or township, to be submitted to the barrister for revision. The 7th section gives any person on the register a right to object to any other person therein as not entitled to be upon it. And by s. 8, a list of the persons objected to is to be published. By s. 34, the overseers are required to attend the court to be held for revising the lists relating to their parish or township, and to deliver to the barrister holding such court the original notices of claim and notices of objections so given to them as aforesaid. And the duties of the revising barrister are defined by s. 40, which, amongst other things, enacts, that, "where the name of any person inserted in any list of voters shall have been objected to by the overseers, or by any other person, and such other person so objecting shall appear by himself, or by some one on his *behalf, [*380 in support of such objection, and shall prove that he gave the notice or notices respectively required by this act to be given by him, every such barrister shall then require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list; and, in case the same shall not be proved to the satisfaction of such barrister, or in case it shall be proved that such person was then incapacitated by any law or statute from voting in the election of members to serve in parliament, such barrister shall expunge the name of every such person from the said lists." [COCKBURN, C. J.—You construe the words at the end of s. 40 to have reference, not merely to whether the

party has the qualification described in the list, but whether he has complied with all the requisites of the act?] Precisely so: his whole title to be on the register is in issue. [Crowder, J.—Can you assign any reason for holding this to be an available objection?] The same that is assigned by Tindal, C. J., in Toms, app., Cuming, resp., viz. the difficulty in obtaining costs, if the notice were permitted to be signed by a third party. [Williams, J.—The objector cannot be founding his objection upon the want of signature by the claimant himself; for, that is a matter which he could know nothing about.] The simple question is, whether the voter has complied with the act, by taking the intermediate steps necessary to entitle him to be placed upon the register. Burton, app., Gery, resp., 5 C. B. 7 (E. C. L. R. vol. 57), 2 Lutw. Reg. Cas. 4, shows how strict a construction the court will put upon the statute with regard to claims. [Williams, J.—There was no other list there than the old register. Crowder, J., referred to Hanaford, app., Whiteway, resp., 1 C. B. N. S. (E. C. L. R. vol. 87), where it was held that a notice of objection sent by post, pursuant to the 6 & 7 Vict. c. 18, s. 100, is not vitiated by *the fact of the postmaster having received it out of the usual hours of business prescribed by the postmaster-general.]

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Macnamara, for the respondent.—2. The revising barrister was not bound to put the claimant to proof of his notice of claim: and, if he were, the notice was sufficient. The object of the notice having been accomplished by the placing of the party's name in the list of claimants, there is an end of all inquiry upon the subject. By s. 5, the overseers are to place upon the list of claimants the names of all persons who on or before the 20th of July then next preceding shall have claimed according to s. 4. In so doing, they are performing, not a mere ministerial duty, but one of a judicial nature, which it will be presumed is done properly, and is not reviewable by the revising barrister. [Cockburn, C. J.—Suppose the overseers put one on the list who had never made any claim at all?] Even then, it is submitted, the revising barrister would have no power to question it. Where a party complains that he is omitted from the list, although he has given due notice of his claim, it is but reasonable that he should be put to proof of the fact: and this accounts for the difference of language used in s. 37. In the case of a claim by a borough voter under s. 15, he is not in terms required to sign the notice, and yet the form in the schedule (B.) No. 6, is the same as that under s. 4. The 40th section, which defines the duties of the revising barrister, only authorizes him to expunge the voter's name where he shall fail to prove to his satisfaction that he is entitled to have his name inserted in the list of voters *in respect of the qualification described in the list.* The 41st section gives the revising barrister power to determine upon the validity of "claims and objections," but not of "notices." The allowance *of costs by the revising barrister is regulated by s. 46; but the court will not merely upon a question of costs impede the exercise of the franchise. By s. 51, the revising barrister is empowered to fine the overseers for any wilful neglect of duty, —amongst others, wilfully and without any reasonable cause omitting the name of any person duly qualified to be inserted in the list: and this the legislature evidently thought a sufficient guarantee for the due performance of this part of their duty. 1. Then, as to the sufficiency of

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the notice. Assuming that the revising barrister had power to call upon the claimant to prove that due notice was given, it is submitted that the personal signature of the party is not necessary, but that the notice may be signed by another in his name and at his request. [CROWDER, J. —That point is decided against you in the two cases referred to, of Hyde *v.* Johnson, and Toms, app., Cuming, resp. However erroneous we may think those decisions, we cannot overrule them. WILLES, J.— They may probably be questioned in a court of error; but not here.] The circumstance of there being no appeal from the decision of this court in these cases, would probably take them out of the ordinary rule. In Morgan, app., Parry, resp., 17 C. B. 334 (E. C. L. R. vol. 84), the 13th section, which requires the lists of voters prepared by the overseers *to be signed by them*, was held to be only directory in this respect.

Kinglake, Serjt., in reply.—The overseers have no means of inquiring whether the signature to the notice is in the handwriting of the claimant or not. Unless, therefore, there be some means of investigating the matter before the revising barrister, this provision of the statute can never be enforced. Suppose the claim be signed with the initials only of the party, or the claim be made orally, or suppose the overseers choose *to dispense with notice altogether,—is their decision to be conclusive? Under s. 37, where a claim has been sent in, and the [*383 claimant's name omitted, whether accidentally or otherwise, the party is compelled to come and prove that he gave due notice, before he can call upon the revising barrister to investigate his right to be on the register. [CROWDER, J.—The argument drawn from that section by the other side, is, that, where the legislature intended the notice to be proved, they have said so in terms.] The claimant does not prove that he was entitled to have his name inserted in the list of voters in respect of the qualification described in the list, unless he proves that he has taken all the preliminary steps necessary to entitle him to have his claim entered in such list.

COCKBURN, C. J.—I am of opinion that the revising barrister was right in allowing the vote in this case. It appears that the voter sent in a claim to the overseers, in due time and in proper form, to have his name inserted in the list of claimants, but that, instead of being signed by himself, it was signed by some one else in his name and by his authority. The overseer, acting upon the notice, inserted the name of the party in the list of claimants. The vote being objected to, the qualification was proved: and the only objection now, is, that the act requires that the notice of claim shall be signed by the party's own hand, and that this vicarial signature is not sufficient. The opinion I have formed, is, that this is in the first instance a matter between the claimant and the overseers. If the overseers are satisfied that the notice is the notice of the person who claims to be entitled to vote, and choose to act upon it, and to place the claimant's name upon the list of claimants,—which together with the old register constitutes the list to be revised,—it seems to me that the *revising barrister has nothing to do but to consider whether the claimant makes out his right to be upon the [*384 register in respect of the qualification described in the list. The question turns upon that part of the 40th section of the 6 & 7 Vict. c. 18 which enacts, that, "where the name of any person inserted in any list of voters shall have been objected to by the overseers, or by any other

person, and such other person so objecting shall appear by himself, or by some one on his behalf, in support of such objection, and shall prove that he gave the notice or notices respectively required by this act to be given by him, every such barrister shall then require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list; and, in case *the same* shall not be proved to the satisfaction of such barrister, &c., such barrister shall expunge the name of every such person from the said lists." Now, the first observation that arises upon that, is, that, before the revising barrister is called upon to act, the claimant is to prove that he has given the notices required by the act to be given by him; and then the revising barrister is to require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list. What is meant by these words? It seems to me that full light is thrown upon that part of the section by the 37th, which enacts, "that, if any person who shall have given to the overseers of any parish or township due notice of his claim to have his name inserted in the list of persons entitled to vote in the election of a knight or knights of the shire, shall have been omitted by such overseers from such list, its hall be lawful for the
*385] revising barrister, upon the revision of such list, to *insert therein the name of the person so omitted, in case it shall be proved to the satisfaction of such barrister that such person gave due notice of such his claim to the said overseers, and that he was entitled on the last day of July then next preceding to be inserted in the said list of voters." So, in s. 38, which, though it relates to city and borough lists, is in pari materia, and very much to the purpose as showing the intention of the legislature, it is in like manner enacted "that the revising barrister shall insert in any list of voters for any city or borough the name of every person omitted who shall be proved to the satisfaction of such barrister to have given due notice of his claim to be inserted in such list, and to have been entitled on the last day of July then next preceding to have his name inserted therein in respect of the qualification described in such notice of claim." So that, under these sections, the revising barrister is to require it to be proved both that due notice has been given to the overseers, and that the party claiming has the qualification represented,—distinguishing between the mere proof of title to be inserted in the list, and the preliminary matters which relate to the giving of the notice. This difference of language seems to me to show that the statute contemplated a totally different state of things in the case of the insertion of an omitted name, from that of the expunging of a name inserted in the overseers' lists. That being so, I do not think we ought to be astute to give effect to objections of this sort, but rather to give effect to the general intention of the act of parliament, that all duly qualified persons should be on the register. The objection is one of a strictly technical nature: and, when we find in the act a plain distinction taken between that which is matter of substance and that which is matter of mere form, I think we are justified in
*386] saying that the form and service of the notice to the *overseers under s. 4, is a matter which rests between them and the party claiming, and that all the revising barrister has to do under s. 40, is, to

see that the qualification as described in the list is proved to his satisfaction.

WILLIAMS, J.—I am entirely of the same opinion. Two questions are reserved for the opinion of the court by the revising barrister in this case, —first, whether he ought to have put the claimant to proof of his claim,— secondly, whether the notice of claim was sufficient. In the view I take, it becomes unnecessary to decide the second question. I am clearly of opinion that the revising barrister was wrong in putting the claimant to proof of his claim. It may be that the notice was so imperfect that the overseers were not bound to place the claimant's name upon the list: but, they having done so, the maxim "fieri non debuit, sed factum valet,"(*a*) applies; and, the name being there, all that the revising barrister was called upon to do, was, to ascertain that the claimant possessed the qualification stated therein. The question turns upon the meaning of that part of section 40 which directs, that, where a notice of objection has been given, the barrister "shall require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters in respect of the qualification described in such list. My Brother *Kinglake* insists that the being entitled to have his name inserted in the list in respect of the qualification therein described, necessarily includes the claimant's having given a proper notice of claim to the *overseers, for that otherwise he would not be entitled to have his name inserted in the list [*387 at all. If the legislature really did intend that such proof should be given, it is somewhat strange that they did not in terms say so. One would naturally have expected, if such had been the intention, that the section would have gone on to say that the claimant should be put to proof that he had duly given the notice required by s. 4. According to the ordinary rule of construction of acts of parliament, the same construction must be put upon the same language in different parts of the act: and, when we turn to s. 37, we find, that, where the legislature intended to require proof of the giving of a notice of claim, they have expressly said so; for, where the claimant's name is *omitted* by the overseer, the revising barrister is to insert it, in case it shall be proved to his satisfaction that the claimant "gave due notice of such his claim to the said overseers, *and* that he was entitled on the last day of July then next preceding to be inserted in the said list of voters." If the latter words in s. 37, exclude the proof of due notice having been given to the overseers, it follows that the same words in s. 40 must receive the same construction. It is obvious, therefore, that it was not competent to the revising barrister to insist upon the notice being proved. The principle upon which this our decision rests undoubtedly goes the whole length of holding,—and I have not the slightest hesitation in saying so, —that, if no notice at all had been given to the overseers, and they had thought fit notwithstanding to put the party's name in the list, that would have been sufficient to entitle him to be upon the register, the other condition being fulfilled.

CROWDER, J.—I am of the same opinion. I think the vote should have been retained, not on the ground that the claimant had proved his

(*a*) Shep. Touch. 6; 5 Co. Rep. 39; T. Raym. 58; 1 Stra. 526. And see per Platt, J., in Nichols v. Ketcham, 19 Johns. (American) 84, 92.

*388] qualification, but that *it was wholly unnecessary to go into the question of notice. The whole question turns upon a few words in the 40th section of the 6 & 7 Vict. c. 18. My Brother *Kinglake* has contended that the words which direct the revising barrister to require it to be proved that the person objected to was entitled on the last day of July, then next preceding, to have his name inserted in the list of voters in respect of the qualification described in such list, are to be interpreted as involving proof of all matters the due performance of which are conditions precedent to the claimant's right to have his name in the list, and that the party is not entitled to have his name in the list unless he has given a notice of his claim to the overseers within the terms of the act. It appears to me, that that is not the meaning of the statute at all; but that it is confined to proof of the title or qualification as described. I entirely agree with my Lord and my Brother Williams that the question how the party gets on the list of claimants is between him and the overseers only. The notice of objection is required to be strictly proved; but not the notice of claim. The 37th section shows that the same language as is used in s. 40 excludes the interpretation which my Brother *Kinglake* insists on. The same construction must be put upon the same words in both instances. It seems to me, therefore, that it was not necessary for the revising barrister to do more than enter upon the question of title. It becomes needless, therefore, to decide whether the notice of claim was sufficient or not. Whatever may be our opinion as to the two cases which have been cited, I think it would not be proper for us to overrule them. That must be done, if at all, in a court of error.

Willes, J.—I am of the same opinion, and for the same reasons.

*389] But I think it right to add, that it is *not to be supposed, that, because we hold the 40th section to be satisfied without there having been any notice of claim at all,—for I agree with my Brother Williams in his application of the principle fieri non debuit, sed factum valet,—the overseers are therefore to take upon themselves to disregard the provisions of the statute. On the contrary, if they improperly insert a claimant who has not given due notice, they may be indicted, and subjected to severe penalties.

Appeal dismissed, with costs.

Borough of WARWICK.

RICHARD CHILD HEATH, Appellant; SAMUEL WILLIAM HAYNES, Respondent. *Nov.* 16.

The inmates of the Earl of Leicester's Hospital,—a charity regulated by a private act of parliament,—each had allotted to him by the master rooms therein of more than the yearly value of 10*l.*, of which he had the exclusive use. The appointment was for life, subject to removal for breach of any of the rules. The inmates were rated in respect of their several occupations:—Held, that they did not occupy "as owners or tenants" within the 27th section of the Reform Act, and therefore were not entitled to be registered.

Rating is not the test of occupation *as tenant.*

At a court held for the revision of the lists of voters for the borough of Warwick, Richard Child Heath duly objected to the names of Jesse

Boddington and of nine others similarly qualified and described being retained on the 10*l.* householders' list of voters for the parish of St. Mary, in the said borough.

The description of the said Jesse Boddington on the register was as follows:—

Name.	Place of abode.	Nature of qualification.	Street, &c., where the property situate, &c.
Jesse Boddington.	High Street, Warwick.	Part of Earl Leicester's Hospital.	High Street.

*The said Jesse Boddington was one of the brethren of the hospital hereinafter described, and known by the name of Earl Leicester's Hospital, and as such occupied the premises in respect of which he claimed to vote. [*390

By an act of parliament passed in the 13th year of the reign of Queen Elizabeth, Robert, Earl of Leicester, was empowered to establish within the town of Warwick, an hospital for "the finding, sustentation, and relief of poor, needy, and impotent people," and it was enacted that such hospital "should be incorporated and have perpetual succession of such members and numbers of poor, needy, and impotent people as should be appointed by the said earl, his heirs, executors, or assigns;" and that the said corporation should have power to hold lands, and should have a common seal, and should be governed by such rules as the said earl, his heirs or assigns, should appoint.

By a private act of parliament of the 53 G. 3, c. 213,—after reciting, that, by a deed bearing date the 21st of November, 1585, the said earl granted land and established the hospital in the town of Warwick, and directed that it should consist of a master and twelve brethren, and should form a body corporate by the name of "The Master and Brethren of the Hospital of Robert, Earl of Leicester;" and that, by a writing under seal, dated 26th of November, 1585, the said earl established rules and ordinances for the government of the hospital,—certain alterations were made in the rules and ordinances, and in the constitution and government of the hospital, for the purpose of authorizing the appointment of additional brethren, and for the better application of the income of the corporate estates: and the hospital is now governed in accordance with the provisions of the said act of parliament. The said rules and ordinances and the said last-mentioned act of parliament are to be read or referred to by either party as *part of the case, if required. Lord De Lisle and Dudley, as heir of the founder, has now the right of appointment of the brethren, whose appointments are for life, subject to removal or deprivation for the causes in the said rules specified. [*391

The income of the corporation is derived from land; and there are chosen from the brethren annually two stewards, who receive the rents and make all payments for repairs and taxes, and also for coals and candles, and other payments for the general purposes of the hospital, which are called kitchen expenses, out of the corporate funds.

The hospital consists of a chapel, hall, and kitchen, apartments for

the master and brethren, and a garden within the walls of the hospital, part of which garden is appropriated for the use of the master, and the other part is divided into specific portions, one for the use of each of the brethren.

The apartments of the master are one side of a quadrangle. The common hall and the apartments of the brethren form the other sides. There is a gateway on one side of the quadrangle, which opens upon an elevated enclosed platform overlooking the High Street in Warwick, and at one end of this platform are large gates which form the communication with the street. These gates are locked at nine o'clock every night, the key thereof being kept by the porter of the hospital, who resides in a lodge adjoining thereto; and, after that hour, it is contrary to the rules of the hospital for any brother to be absent from the hospital without permission of the master. There is no other entrance to the hospital.

Each of the brethren occupies exclusively two rooms, a sitting-room and a bed-room, and a cellar, and a portion of the garden, which together are of greater value than 10*l.* per annum. Each of the brethren
*392] wears a cloak and badge, which are the property of the *corporation. Each person, upon being elected a brother, makes oath that he will be obedient to the master, and that he will not infringe the rules. Each brother is entitled, under the provisions of the lastly hereinbefore mentioned act of parliament, to receive, and does receive, annually, the sum of 80*l.* out of the income of the corporation, exclusive of taxes, and of all payments for coals, candles, and kitchen expenses, and has received that money within twelve months previous to July last. The name of each of the brethren appears upon the rate-book of the parish, as occupier of a house and garden of the gross annual value of 12*l.*

The said Jesse Boddington, whose vote was objected to, had occupied as one of the brethren aforesaid, a sitting-room and bed-room, a small cellar, and a portion of the said garden, being part of the said hospital, for the necessary period in order to entitle him to vote in respect thereof. He was also duly rated for the same, and all rates in respect thereof had been duly paid. The outer door of the sitting-room so occupied by him opened into the court-yard of the hospital, which is within the outer gates; and of this door he kept the key. The bed-room opened out of the sitting-room: and the said Jesse Boddington had the exclusive use and occupation of the premises so occupied, which were together of the value of upwards of 10*l.* a year.

The votes were objected to on the grounds,—that the brethren were members of a corporation aggregate, and were occupying the corporate property for the purposes of the corporation, and were therefore not entitled to vote,—that they were not occupiers, within the meaning of the 27th section of the Reform Act, 2 W. 4, c. 45, of any property in respect of which they were entitled to be registered,—and that the hospital was a charitable institution of the Leicester family, and the brethren had
*393] been in receipt of disqualifying alms *within twelve months next previous to the last day of July last.

The revising barrister decided against each of these grounds of objection, and retained the names on the list of voters; and, it appearing to him that the validity of the objections to the several names of voters thereunder written (nine others besides that of Jesse Boddington)

depended and had been decided by him upon the same state of facts and upon the same points of law, he declared the same consolidated with the principal case.

The following were the rules and ordinances of the foundation, which were appended to the case:—

"Ordinances, statutes, and rules made by us, Robert Earl of Leicester, Baron of Denbigh, &c., &c., the 26th day of November, in the 28th year of the reign of Elizabeth, by the grace of God, Queen, defender of the faith, &c., for the order and government of the hospital in the town of Warwick, in the county of Warwick, called the Hospital of Robert Earl of Leicester in Warwick, founded by us the said earl:—

"1st. *Master, and his qualities.* Imprimis, we will and ordain that none shall be elected or preferred to be master of the said hospital, but such one as shall be an ordained preacher of God's word, and of good life and conversation: and, if any other elected, &c., it shall be lawful for the visitors of the said hospital, or two of them, to deprive the said master:

"2d. *Vicar of St. Mary's.* Item. Forasmuch as the portion of living now allowed to the vicar of St. Mary's, in Warwick, is very small for so great a cure and charge as belongs to the said vicar, We therefore will, ordain, and require, that, after the death of the said earl, from time to time as the said mastership shall become void, the vicar of St. Mary's, in Warwick, for the time being, shall be preferred to the said *mastership, if he be a man of the qualification before specified; and that the heirs of us the said earl, or such other person as we have or shall appoint, to have the nomination and election of the said master, &c.: [*394

"3d. *Oath of master for the supremacy.* That the person and persons hereafter elected master of the said hospital, before he takes upon himself the said mastership, &c., shall take the oath of supremacy, &c.:

"4th. *Oath of the master for the government of the house.* Item. The same elected master, before he take upon himself the mastership or shall be master of the said hospital, in the presence aforesaid shall take a corporal oath upon the Holy Evangelists, to the effect following, viz. 'I, J. S., shall govern and order this hospital and the poor thereof in the fear of God, according to the laws, statutes, and ordinances of the founder thereof. I shall not willingly defraud the poor, or any of them, of any right or duty to them assigned or belonging. I shall not consent or agree to any act or thing whatsoever whereby the poor of this house may be defrauded, or the good intent of the founder thereof made frustrate. I shall, as near as I can, keep all the statutes, ordinances, and rules instituted by the founder of the said hospital, not contrary to the law of God or the laws of this realm. I shall not take, directly or indirectly, any reward or promise of reward for the placing of any poor brother or brethren in this house. So help me God:'

"5th. *Magistre sede vacante.* Item. That, as often as the said hospital shall be vacant of a master by death, resignation, or otherwise, the vicar of St. Mary for the time being shall be, sede vacante, the governor and ruler of the said hospital and the poor people therein until the same shall be provided of a master, according to the foundation and corporation thereof:

*395] "6th. *Oath of the brethren.* Item. Each person to *be elected a brother of the said hospital, before he be admitted a brother of the same, shall take a corporal oath upon the Holy Evangelists before the master and most part of the brethren, and, for want of a master, in the presence of the vicar of St. Mary's aforesaid for the time being, hereafter, viz. 'I, J. S., during the time I shall be a brother of this hospital, shall be obedient to the master of the same hospital in all lawful and honest things not contrary to the statutes and ordinances of the founder of the same. I shall not willingly infringe or break any of the laws, statutes, or ordinances of the founder thereof, but, living peaceably and quietly in this hospital, shall to the best of my power maintain and uphold the same. So help me God:'

"7th. *Number of the poor, and their qualities.* Touching the poor of the same hospital, we will they shall be twelve in number, besides the master: and we ordain that such poor and impotent persons not having of their own to relieve themselves, as shall be hereafter maimed or hurt in the wars, in the service of the Queen's Majesty, her heirs and successors, especially such as shall be under conduct or leading of us or our heirs, or the servants and tenants of us and of our tenants, shall be preferred before all others to the place and room which shall become void in the said hospital:

"8th. Item. We ordain that none shall be preferred to any place or room in the said hospital but such as shall be born in the counties of Warwick or Gloucester, or there dwelling and abiding by the space of four or five years at the least:

"9th. Item. We will, that, if there be no poor people which have been maimed or hurt in the wars as aforesaid, that then such poor and impotent persons as shall be decayed by sickness or some other misfortune, and not by their own wicked wastefulness and riotous consuming, *396] and especially the tenants and servants of *us or our heirs shall be preferred to the place and room of a brother in the said hospital:

"10th. Item. We ordain that the lame and maimed soldiers and poor people of the quality and conditions aforesaid, which shall happen to be in the town of Warwick, Kenilworth, and Stratford-on-Avon, in the said county of Warwick, or in the lordship of Wooten-under-Edge, and Ealingham, in the county of Gloucester, shall be preferred to the place and rooms aforesaid, before any other, viz. first, the town of Warwick, second, the town of Kenilworth, thirdly, the town of Stratford-on-Avon, fourth, the lordship of Wooten-under-Edge, and fifth, the lordship of Ealingham, alterius viscibus; and, for default of such poor and maimed people in the towns aforesaid, then the same poor and brethren to be taken and chosen out of any town in the said county of Warwick:

"11th. Item. We ordain that such as shall be admitted a poor brother of the said hospital after the death of us the said earl, shall be commended by the minister and churchwardens of the parish where he was last abiding, by writing under their hands and seals, to be of honest life and conversation:

"12th. *Repair to church by brethren.* Item. We will and ordain that the poor brethren of the said hospital for the time being shall duly resort and decently go together, in their liveries, to the ordinary service and sermons in the parish church of St. Mary's, and especially on the

Sabbath days; and, if any make default, unless it be by reason of sickness or some other lawful impediment, that then the person offending shall forfeit for every offence 6*d.*, to be deducted from such money or allowance as he shall have in the said hospital:

"13th. *Vice punished in the brethren.* Item. We ordain, that, if any brother of the said hospital shall commit adultery or fornication or other uncleanness, *and that duly proved, or shall steal, within the house or without, to the value of 1*s.*, and shall be convicted [*397 thereof by sufficient testimony, that then, ipso facto, the said brother be expelled:

"14th. Item. If any brother shall be an heretic or notorious blasphemer, or a drunkard, or a quarreller in the house or abroad, to be for the first fault sharply reprehended, for the second to be removed from his commons fifteen days, or lose fifteen days' allowance; in which time, if he make his humble suit to the master, and reconcile himself to the brethren, showing himself penitent for his evil example, then to be again received, by the special assent of the master and most part of the brethren, or else to be removed for ever: and, the third fault, to be ipso facto disabled to be a brother of the said house, and deprived for ever:

"15th. Item. If any brother shall behave himself stubbornly, or disobediently, or contemptuously, or in any respect disorderly, towards the master for the time being, in check, taunt, or slander, he to be punished as in that last article for every several offence:

"16th. *Lodging out of the house.* Item. That no brother lodge in the night out of the hospital, without leave of the master or his deputy, upon pain of deprivation and the loss of his living:

"17th. *Lodging of strangers.* And that no brother shall lodge any strangers in his chamber with him, upon pain of forfeiting fifteen days' commons, or the value thereof:

"18th. *Going in their liveries.* Item. That no brother go into the town without his livery on his back, upon pain of losing his commons or allowance for eight days:

"19th. *Riding out of the town.* That no brother shall go or ride forth out of the town, without leave of the master or his deputy, upon pain, for the first offence, *to lose one month's commons or allowance, and for the second offence, to be put out of the house: [*398

"20th. *Keeping of hawks and dogs.* Item. That no brother, without leave of the master, keep dog or hawk within the hospital, upon pain of losing his commons and his allowance of money during the time he shall so keep dog or hawk:

"21st. *Unlawful games and suspected houses.* Item. That no brother use any unlawful games, either in the house or abroad, or frequent any suspected house, or admit any such to his chamber customably as are or have been infamous for lewdness, upon pain, for the first offence, to lose fifteen days' commons, or the allowance thereof, and, for the second offence, to be removed out of the house till he shall reconcile himself, and confess his fault before the master and all his brethren, and, for the third offence, to be ipso facto deprived for ever:

"22d. *Laundresses.* Item. That no brother take any woman to serve or tend upon him in his chamber, without special license of the master, or any with license under the age of three score years, except

she be his wife, mother, sister, or daughter, upon the pain last before mentioned for their several offences:

"23d. *Filthiness and uncleanness.* Item. That every brother of the said hospital shall keep his chamber sweet, without wilfully annoying any of his brethren in any filthy or unseemly manner, upon pain of loss of his commons fifteen days for the first default, for the second, the loss of wages and commons for the space of three months, for the third, to be removed for ever:

"24th. *No brother to have 5l. yearly living.* Item. That no person shall be a brother of this hospital, or enjoy any part of the living or benefit allowed or to be allowed for a brother, if he shall have any manner of way any living to the clear value of 5*l.* per annum or above; and, if any such hereafter shall be, he shall be ipso facto deprived:

*399] *"25th. *Marriage.* That no brother shall in this hospital marry a wife, without special consent of the master, upon pain of forfeiting his place ipso facto:

"26th. *Property of the goods, in whom it shall be.* Item. That the property of the livery, bedding, and every other thing which every brother shall enjoy of the liberality or gift of us, our heirs, or at the charges of the said hospital, shall be in the master and brethren, and not in any private person, and shall be delivered to every brother upon condition that he shall not alienate the same, or alter the property thereof from the said corporation, and not otherwise:

"27th. *Begging and breaking of hedges.* That, if any brother of this hospital shall be found begging either at or about the hospital itself, or elsewhere abroad, or shall be found unlawfully breaking any hedge, or unlawfully cutting or carrying away any wood, the same shall, for the first offence, lose 1*s.* 6*d.*, for the second 6*s.*, to be deducted and divided off his wages and allowance for commons, and for the third offence shall be forthwith expelled the said hospital for ever:

"28th. *Railing.* We ordain that no brother of this hospital shall give any railing words or uncharitable speech to the master or any of the brethren of the said hospital, under the pain of 3*s.* 4*d.* for every such offence against the master, and upon pain of 6*d.* for every such offence against any brother; the said forfeitures to be deducted and divided out of his wages and allowance for commons:

"29th. *Striking and fighting.* That no brother of this hospital shall give any blow or strike to the master, or any of the brethren of the said hospital, under the pain of forfeiture of one whole months' wages or commons for the first offence, to be deducted and divided as is last above said, and, for the second offence, to be expelled for ever out of the said hospital:

*400] "*30th. *Prayers in the house.* We ordain that the master or his deputy, and the poor brethren of this hospital, or so many of them as shall not be impotent, sick, or pressed by great business, every evening, immediately after shutting of the gates, and every morning before 8 o'clock, shall assemble together in the chapel or common hall of the said hospital, at the sounding of the hand bell, which the brethren each one, each day, by turns shall ring, and which shall be left at the lodging of him whose turn it is to ring it; and then, upon their knees, with loud and audible voices, shall all together say in English these prayers following at large, that is to say,—'Prepare our hearts, oh Lord, and

open our mouths to prayer:' then, for the morning and evening daily, this,—'Almighty God, and most merciful Father, we have erred and strayed, &c. &c.:'

"31st. *Absence of master.* Item. We ordain that the master of the said hospital, for the time being, shall be resident and abiding in the said hospital, and shall not be absent from it above one week at a time, or above one month in a year at several times, without license of the Bishop of Worcester, the Recorder of Coventry, the Recorder of Warwick, for the time being, or two of them, and always in his absence, with license or without, to have a sufficient deputy in the said hospital, to order the same, upon pain to forfeit for every offence the fourth part of that year's allowance in commons, money, and otherwise, to be divided among the brethren of the said hospital:

"32d. *Visitors.* We ordain that the Bishop of Worcester, the Dean of Worcester, and the Archdeacon of Worcester, for the time being, or any two of them, after the death of us the said earl, shall be visitors of the said hospital, and that it shall be lawful for them, or any two of them, to visit the said hospital at any time at their pleasure, so be it not above once in three *years, and to correct, punish, and reform all [*401 abuses and offences to be committed or done by the said master and brethren, or any of them, and to see these our ordinances truly executed, according to the meaning of the same: Provided always that the master or brethren, or any two of them, shall not be compelled to go out of the town of Warwick to any such visitation:

"33d. It is ordered that these ordinances shall hang continually in the chapel, &c. &c.:

"34th. *Order of the lands.* Touching the lands, tenements, possessions, and hereditaments already given or granted for the relief or maintenance of the said hospital, or the master or brethren of the same, we will and ordain that the rents, revenues, and profits thereof coming and growing, all ordinary and necessary charges deducted, shall be divided into four equal parts, whereof one fourth part, so it do not exceed yearly 50*l.*, or so much thereof as shall amount to 50*l.* yearly if the said fourth part do exceed the sum of 50*l.*, shall be allowed and paid to the master, or such person as shall supply the master's place, according to these ordinances, and the other three, residue of the said revenues and profits, to be employed upon the twelve brethren of the hospital for the time being equally in meat, drink, money, and other necessaries, or in money alone, according as we the said earl during our lives, or, after our deaths, the Bishop, the Recorder of Coventry and Warwick for the time being, or any two of them, shall think fit: Also we ordain that the lands, tenements, possessions, and hereditaments already given or granted, or hereafter to be given or granted, for the relief and maintenance of the said hospital, or the master and brethren thereof, other than the site of the hospital itself, shall from time to time be granted, let out, and demised to honest and sufficient persons that will live upon the dwelling-houses of the same, if there be any, for terms *of years, or for term [*402 of one, two, or three lives, by copy of court rolls, according to the custom of the manors whereof they be parcel, and the same to be done to the best advantage and improvements in yearly rents that with conscience may be, and with such cautions, conditions for reparation, or otherwise, as the change of times shall require and the wisdom and dis-

cretion of the recorders for the time being shall devise for the most benefit of the poor of the said hospital: Provided, nevertheless, and we ordain that it shall not be lawful for the master and brethren of the said hospital for the time being to make any lease or leases of the said lands, tenements, and possessions, or any part thereof, for any larger or longer estate therein or term than twenty-one years or under, to be accounted from the making of such lease or leases, nor without impeachment of waste, nor of any lands or tenements whereof any further demise or lease shall then continue or be, or else which shall not be expired, surrendered, or determined within one year next after making of the same new lease or leases: Provided also, and we ordain, that, if any person or persons now being, or which shall hereafter be, master of the said hospital, at any time, hereafter advisedly determine, or effectually attempt, practise, or go about act or acts, thing or things whatsoever, for or concerning any bargain, sale, discontinuance, alienation, exchange, or charge, to be had, made, done, or suffered of, on, or out of any lands, tenements, or hereditaments heretofore given, granted, or conveyed or assured, or hereafter to be given, granted, conveyed, or assured, for the maintenance and relief of the said hospital, or the master and brethren of the same, or of any part thereof, otherwise than before in these presents is limited, expressed, and allowed, without the consent of the bishop and recorders aforesaid for the time being first had and obtained
*403] in writing under their hands; *and also the same act or acts, thing or things, shall execute and put in use or effect by any overt act or deed,—that then every such master, immediately after every such attempt, practice, or going about, shall thereupon, by virtue hereof, and by force of the statute made in the thirteenth year of the reign of our sovereign Lady the Queen's Majesty that now is, for the erecting and founding of the said hospital, be ipso facto deprived of the said mastership, and be disabled to be master of the said hospital."

Pickering, Q. C. (with whom was *Byles*, Serjt.), for the appellant.(*a*) —The brethren of the Earl of Leicester's Hospital, being members of a corporation aggregate, are not entitled to be registered. In Dalton's Sheriff 334, it is laid down that "fellows of houses or colleges in universities are holden to have no voices (in the election of knights of the shire) for or by reason of their chambers or other avails, &c., in their colleges." And the same principle applies to borough voters. The
*404] point seems to have been assumed by the court in *Simpson, app., Wilkinson, resp., 7 M. & G. 50 (E. C. L. R. vol. 49), 8 Scott N. R. 814. [WILLIAMS, J.—It is so laid down in Heywood on County Elections 115.] Corporations sole have been allowed to vote, but not corporations aggregate. [COCKBURN, C. J.—Mr. Rogers does not see the

(*a*) The points marked for argument on the part of the appellant, were,—

"1. That a member of a corporation aggregate is not, quâ such member, entitled to be placed on the list of voters for a borough:

"2. That the property in respect of which alone each of the respondents claims to be entitled to vote, is property exclusively belonging to and occupied by a corporation aggregate:

"3. That neither of the said respondents is an owner, tenant, or occupier of any house, warehouse, counting-house, shop, or other building, of the clear yearly value of not less than 10*l*., within the meaning of the 27th section of the Reform Act, 2 W. 4, c. 45:

"4. That neither of the respondents is entitled to be placed on the register of voters, by reason of his receipt of disqualifying alms within twelve calendar months prior to the last day of July last:

"5. That neither of the respondents appears to have paid rates for the relief of the poor."

distinction. In his treatise on the Law of Elections, 7th edit. 150, he says,—"Sole corporations vote without objection. It is difficult to understand the principle upon which individuals who are members of corporations aggregate are disabled from voting in right of the interest they possess as members of a corporate body. The disability cannot arise out of the tenure by which they hold, because such would also apply to corporations sole; nor can any valid objection be found in the circumstance that they do not hold their interest in severalty, because such would also exclude joint tenants, tenants in common, and co-parceners." In the preceding page, however, he distinctly states the law to be so. "The individual members of corporations aggregate have not separate voices at elections, in respect of their corporate interest in land,"—citing Dalton's Sheriff 334. And he also refers to the Cambridge Case of May 28, 1624: "The freeholders complained that the scholars and fellows of colleges and halls gave voices at the election. The House resolved 'that members of colleges, halls, or corporations, not having freehold, saving in right of their colleges, halls, or corporations, ought not to have votes in elections of knights or burgesses:' and, upon a second question, 'that fellows and scholars that have fellowships and chambers above 40*s*., ought not to have voices in elections.'"] The reason is that given in Com. Dig. *Franchises* (F. 14.), that "a corporation cannot do a personal act, which requires knowledge." [COCKBURN, C. J.—The majority binds the minority; therefore, the corporation would have to vote en masse. If not entitled to vote as owners, are they as tenants?] That *question depends upon the 27th section of the Reform Act, 2 W. 4, c. 45, which enacts, "that, [*405 in every city or borough which shall return a member or members to serve in any future parliament, every male person of full age, and not subject to any legal incapacity, *who shall occupy*, within such city or borough, or within any place sharing in the election for such city or borough, *as owner or tenant*, any house, warehouse, counting-house, shop, or other building, being either separately or jointly with any land within such city, borough, or place occupied therewith by him as owner, or occupied therewith by him as tenant under the same landlord, of the clear yearly value of not less than 10*l*., shall, if duly registered according to the provisions thereinafter contained, be entitled to vote in the election of a member or members to serve in any future parliament for such city or borough." These parties do not occupy as tenants, but simply as brethren or members of the corporation. The rules and ordinances preclude the notion of an occupation such as is contemplated by the statute. The occupation of each individual brother or member commences when he becomes a brother, and terminates when he ceases to fill that character. [COCKBURN, C. J.—Can his lodgings or chambers be changed?] It does not appear very precisely on the case: but probably the oath of obedience required by the 6th rule would enable the master to change them. Then, if he is tenant, he has no control or dominion over the outer door, the key of which is kept by the master; and he cannot absent himself at night without leave,—rule 16. It is like the case of the landlord residing upon the premises. [CROWDER, J. —How does the corporation reside?] The position of the parties is certainly an anomalous one.

The receipt of alms also operates a disqualification, by virtue of s. 36.

*406] *Hayes*, Serjt., for the respondent.(*a*)—The only question is, whether the persons named had a right to vote under the 27th section of the Reform Act. It is submitted that they had. In Elliott on Elections, p. 142, it is said: "The claimant must occupy in his own right, and not as servant of another: and he must have some interest, such as tenant at will at least, in the premises. But, as observed by Mr. Rogers, p. 147, 'it is not necessary for him to show that he is actual owner or actual tenant: if a party occupy under a claim of title or right, it will be sufficient; for, no investigation can be had into conflicting claims of title; the words as owner and as tenant show that it is the character in which the party has actually occupied which is to be ascertained, and not his strict right to occupy in that character.'" Again, at p. 144, Mr. Elliott says: "It is conceived that the liability to be rated will, in general, be found to be a safe test as to the character in which a person occupies, for the purpose of voting." These parties are rated, and properly rated as occupiers: The King *v.* Watson, 5 East 480; The King *v.* The Mayor, &c., of Sudbury, 1 B. & C. 389 (E. C. L. R. vol. 8), 2 D. & R. 651 (E. C. L. R. vol. 16); The King *v.* Munday, 1 East 584. [CROWDER, *407] J.—Do you contend, that, in all cases where the *party is liable to be rated he is entitled to vote?] In all the text-books, the liability to be rated is put as the test. [COCKBURN, C. J.—The statute 43 Eliz. c. 2, does not apply. The question is whether the parties occupy "as owners or tenants."] An occupation as owner or tenant embraces every conceivable description of occupation, except an occupation *as servant*. In Hughes, app., The Overseers of Chatham, resp., 5 M. & G. 54 (E. C. L. R. vol. 44), 7 Scott N. R. 581, 1 Lutw. Reg. Cas. 51, Dobson, app., Jones, resp., 5 M. & G. 112, 7 Scott N. R. 80, 1 Lutw. Reg. Cas. 105, and Clark, app., The Overseers of St. Mary, Bury St. Edmunds, resp., 1 C. B. N. S. 23 (E. C. L. R. vol. 87), a distinction was taken between an occupation by a government officer or a servant by the *permission* of the employers, as part remuneration for his services, and a compulsory occupation for the purpose of the better performance of his duties as such officer or servant: in the former case, the party was held entitled to be registered; in the latter, not. In the former of those cases, Tindal, C. J., in delivering the judgment of the court, says: "There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee, for years, at will, or for any other estate or interest; and, if he does so, the servant then becomes entitled to the legal incidents of the estate as much as if it were purchased for any other consideration. But it may be that a servant may occupy a tenement of his master's, not by way of payment for his services, but for the purpose of performing them; it may be that he is not *permitted* to occupy, as a reward, in the performance of his master's contract to pay him, but

(*a*) The points marked for argument on the part of the respondent, were,—

"1. That Jesse Boddington was entitled to be registered, and was rightly registered, as a 10*l.* occupier within the 27th section of the Reform Act:

"2. That the circumstance that the corporation of which Boddington was a member owned the property, is immaterial, the occupation being by Boddington himself for his own personal benefit, and not by the corporation, and the revising barrister having so found:

"3. That no disqualification arose from the alleged receipt of alms,—the benefits which Boddington was entitled to and received as a brother of the Hospital not being in the nature of parochial alms, nor indeed of alms at all."

required to occupy, in the performance of his contract to serve his master. The settlement cases cited in argument established and proceeded on this distinction. We think it applicable to the present question; *and, as there is nothing in the facts stated to show that the claimant [*408 was *required* to occupy the house for the purposes of his services, or did occupy it *in order* to their performance, or that it was *conducive* to that purpose more than any house which he might have paid for in any other way than by his services, and, as the case expressly finds, that he had the house as part remuneration for his services, we cannot say that the conclusion at which the revising barrister has arrived [disallowing the objection] is wrong." In Dobson, app., Jones, resp., the same learned judge says: "In delivering our opinion upon a former case, we laid down at some length the principle upon which we thought the class of cases to which the present appeal belongs ought to be decided; and we drew the distinction between those cases where officers or servants in the employ of government are *permitted* to occupy a house belonging to the government as part remuneration for the services to be performed, and those in which the places of residence are selected by the government, and the officers or servants are *required* to occupy them, with a view to the more efficient performance of the duties or services imposed upon them. Upon that occasion, we declared our opinion to be, that those officers or servants who fell within the first description might properly be considered to occupy as tenants, although the residence was allotted to them as such officers and servants, and although they might, if such residence had not been allotted to them, have had an additional allowance for lodging-money; whilst at the same time we stated that the relation of landlord and tenant could not be created by the appropriation of a particular house to an officer or servant as his residence, where such appropriation was made with a view not to the remuneration of the occupier, but to the interest of the employer, and to the more effectual performance of the *service required from such officer or servant: upon the same [*409 principle as the coachman who is placed in rooms of his master over the stable, the gardener who is put into a house in the garden, or the porter who occupies the lodge at the park gate, cannot be considered to occupy as tenants, but as servants merely, whose possession and occupation is strictly and properly that of their masters." And the conclusion the court arrived at was, that the case in hand fell within the latter class, and that consequently there was no occupation in the legal relation of tenant to a landlord, and no right to vote. In Davis, app., Waddington, resp., 7 M. & G. 37 (E. C. L. R. vol. 49), 8 Scott N. R. 807, the trustees of an alms-house were empowered by letters patent of incorporation to appoint and remove the twenty-four inmates, "toties quoties sibi conveniens fore videbitur:" and it was held that the inmates appointed under this power did not take an estate for life in the property enjoyed by them as such inmates, and were therefore not entitled to be registered as freeholders. The subject is ably discussed in some very learned notes by Serjt. Manning to that case and also to the case of Wynne *v.* Wynne, 2 M. & G. 19 (E. C. L. R. vol. 40). There are many sorts of tenancies which would suffice to confer the franchise: one who is let in under a contract to purchase, would be a tenant at will,—Doe d. Gray *v.* Stanion, 1 M. & W. 695, 700,†—and as such might acquire a right

to vote. [WILLES, J.—Suppose he occupied for more than twenty years, would he acquire a fee?] Possibly. [COCKBURN, C. J.—You say these parties are tenants. Are they tenants from year to year, or at will, or on sufferance?] Their tenancy is to enure so long as they shall observe the rules of the hospital: Simpson, app., Wilkinson, resp. 7 M. & G. 50, (E. C. L. R. vol. 49), 8 Scott, N. R. 814, 1 Lutw. Reg. Cas. 168. [COCKBURN, C. J.—That would be in law a tenancy for life,—a freehold in-
*410] terest. May there not be a permissive occupation *without creating a tenancy?] A permissive tenancy is synonymous with a tenancy at will: Elliott on Registration, p. 143.

Pickering, Q. C., in reply.—The circumstance of the party being rated affords no evidence of an occupation as *tenant*. By the statute of Elizabeth, every person is liable to be rated who has a beneficial occupation. It is no part of the duty of parish officers to inquire into titles. In Dobson, app., Jones, resp., 5 M. & G. 112 (E. C. L. R. vol. 44), 8 Scott, N. R. 80, 1 Lutw. Reg. Cas. 105, and in Clark, app., The Overseers of St. Mary's, Bury St. Edmunds, resp., 1 C. B. N. S. 23 (E. C. L. R. vol. 87), the parties had a beneficial occupation, and were rated, and yet they were held not entitled to vote. In the present case, the ownership is in the corporation, and each of the brethren, by allotment of the master, as a member of the corporation, but not as tenant in any sense, occupies certain rooms,—acquiring no right whatever until the allotment takes place.

COCKBURN, C. J.—I am of opinion that these votes must be disallowed. The question arises upon the construction of the 27th section of the Reform Act, 2 W. 4, c. 45, which enacts that every male person of full age, and not subject to any legal incapacity, who shall occupy, *as owner or tenant*, any house, &c., of the clear yearly value of not less than 10*l*., shall, if duly registered, be entitled to vote. These persons occupy tenements which would suffice to entitle them to vote if their occupation were such as the statute requires. But it appears to me that they do not occupy either as owners or as tenants. We are bound by the words of the section: it is not enough to show a beneficial occupation, unless it be an occupation as owner or in the legal relation of
*411] tenant to a landlord. Now, it is clear, and indeed it is *conceded, that these parties do not occupy as owners,—the ownership of the property being ex concessis in the corporation aggregate. Then, do they occupy as tenants? It appears to me that they do not. There is nothing in the circumstances under which their occupation arises which creates either expressly or by implication the legal relation of landlord and tenant. The corporation, as it seems to me, occupies in the persons of its several members. If any individual member of the body were improperly interfered with in his occupation, his only remedy would be by an application to the Court of Chancery, to have the charity administered according to the will of the founder. Cases of rateability under the 43 Eliz. c. 2 have been referred to. But in these, it is to be observed, the party occupying is to be rated without any qualification whether as owner or as tenant: therefore, any beneficial occupation is sufficient. If similar words had been used in the Reform Act, those cases might have been important to show that these persons had such a beneficial occupation as would give them a right to vote. But this

statute requires something more. I think the appeal must be allowed, but without costs.

The rest of the court concurring,

Appeal allowed, without costs.

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*County of NORTHAMPTON.—Southern Division. [*412

WILLIAM FAULKNER, Appellant, The Overseers of UPPER BODDINGTON, Respondents. *Nov.* 19.

Pursuant to the trusts of two wills, certain lands in Northamptonshire were purchased in 1776, and vested in trustees upon trust to apply the rents and profits, amongst other charitable purposes, to and amongst certain persons described as "the six beadsmen of Daventry," as to whose origin there was no evidence. The persons thus described had received 50*s.* a year each for the last twenty years; but they had all been appointed since the passing of the Reform Act, by resolution of the bailiffs and burgesses of Daventry, in whom the appointment had from very early times been vested, and who were also trustees under the above-mentioned wills:—Held, that the parties so appointed had not an estate which came to them by promotion to *an office* within the meaning of the 2 W. 4, c. 45, s. 18, and therefore were not entitled to be registered.

AT a court holden for the revision of the list of voters for the parish of Upper Boddington, in the southern division of the county of Northampton, Samuel Hull duly objected to the names of William Faulkner and five others (thereunder written) being retained on the list of voters for the said parish of Upper Boddington; and, it appearing to the revising barrister that the validity of the objections to the several names of persons thereunder written (five) depended and had been decided by him upon the same state of facts and the same points of law, he declared that the several appeals against such decision ought to be consolidated; and he named William Faulkner to be the appellant, and the overseers of the parish of Upper Boddington to be the respondents, in such consolidated appeal.

The following were the facts of the case:—

The six persons objected to are called "The Beadsmen of Daventry;" and they claim a right to vote in respect of their freehold estates in a certain piece of land in the parish of Upper Boddington.

The said piece of land was purchased about the year 1776, with moneys bequeathed by one Edward Sawbridge and one Mary Walford for that purpose, and was conveyed to trustees, in compliance with the wills of the said Edward Sawbridge and Mary Walford, upon trust to apply the rents to various charitable purposes, and, amongst other things, in trust to pay to and divide *amongst the six Beadsmen of Daventry a certain portion of the said rents. [*413

The land is let to one Baseby, and the net amount of rent received by the trustees is 100*l.*; out of which the trustees have, under the above-mentioned trusts, annually for the last twenty years paid to each of the six beadsmen the sum of 50*s.* Previously to that time the amount paid to them was not so large; but the increase arose partly from the rent of the land being raised, and partly from some of the other objects of the charity ceasing to exist.

No evidence was given respecting the first appointment of six beads-

men at Daventry: but, from very early times, the same number had been kept up; the appointment of them being vested in the bailiff and burgesses of Daventry, who were also trustees under the wills of the said Edward Sawbridge and Mary Walford.

The beadsmen are now appointed by a resolution of the trustees entered in their minute-book in this form,—"A. B. is appointed a beadsman, in the place of C. D., deceased:" and the appointment is for life.

All the six persons objected to have been appointed since the passing of the Reform Act, 2 W. 4, c. 45.

Neither under the trusts above referred to, nor in their character as beadsmen, are they liable to be called upon to perform duties or services of any kind; nor have they in fact ever been so called upon.

It was contended, on the part of the respondents, that the persons objected to had no estate, either legal or equitable, in the land out of which the said rent of 100*l.* issued; and that, if they had, it was not of sufficient value to confer the franchise, having been acquired since the passing of the Reform Act.

On the part of the appellants, it was contended that the persons
*414] objected to took, as "beadsmen," an *equitable estate in the land, of sufficient value; because the term "beadsman," necessarily imported the holding a "benefice, office, or employment," having been originally applied to persons who were employed in the pious office of praying for others, and upon whom, according to the usage of former times, benefactions were frequently conferred in consideration of such employment.

The revising barrister held that the six persons objected to had an equitable estate in the land, but that the same had not come to them by promotion to any benefice or office within the meaning of the 18th section of the 2 W. 4, c. 45, and, consequently, that their estate was of insufficient value: and he accordingly expunged their names from the list.

The name, residence, and nature of the qualification of William Faulkner appeared on the list of voters, as follows:—

Christian name and surname.	Place of abode.	Nature of qualification.	Street, lane, or other like place. &c., where the property is situate, or name of the property, and the name of the tenant, &c.
Faulkner, William.	Daventry.	Freehold land.	Upper Boddington. William Baseby.

The name, residence, and qualification of each of the other five persons objected to, viz. Joseph Goodwin, John Newitt, Abraham Pool, Thomas Wadams, and Thomas Woolf, were similarly described in the same list.

Hayes, Serjt., for the appellant.—The question turns upon the construction of the 18th section of the Reform Act, 2 W. 4, c. 45, which enacts "that no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament, or in the election of a member or members to serve in any future parliament for any city or town being a county of itself, in respect of any freehold

lands or tenements whereof *such person may be seised for his own life, or for the life of another, or for any lives whatsoever, except such person shall be in the actual and bonâ fide occupation of such lands or tenements, or except the same shall have come to such person by marriage, marriage-settlement, devise, or *promotion* to any benefice or *to any office*, or except the same shall be of the clear yearly value of not less than 10*l.* above all rents and charges payable out of or in respect of the same; any statute or usage to the contrary notwithstanding: Provided always, that nothing in this act contained shall prevent any person now seised for his own life, or for the life of another, or for any lives whatsoever, of any freehold lands or tenements in respect of which he now has, or but for the passing of this act might acquire, the right of voting in such respective elections, from retaining or acquiring, so long as he shall be so seised of the same lands or tenements, such right of voting in respect thereof, if duly registered according to the respective provisions hereinafter contained." These parties, it is submitted, are entitled within the fair construction of that section to be registered, as coming within the exception of persons having an (equitable) estate of freehold of the required value coming to them by "promotion to an office." [*415] [COCKBURN, C. J.—Is it disputed that they have an equitable interest?] That question was disposed of by the case of Simpson, app., Wilkinson, resp., 7 M. & G. 50 (E. C. L. R. vol. 49), 8 Scott N. R. 814, 1 Lutw. R. C. 268. [COCKBURN, C. J.—The point is not open to the respondents upon the case as stated.] Before the passing of the Reform Act, these persons would have had an undoubted right to vote; and they clearly are not within the object of the disfranchising part of the section in question, the manifest design of which was to prevent the acquisition of collusive or colourable freeholds for life for the purpose of voting. *[COCKBURN, C. J.—To what "office" are these persons promoted?] The office of beadsman. [COCKBURN, C. J.—Would that be an office such as would, if conferred by the Crown, disqualify the parties from sitting in parliament?] That is hardly the test. Dr. Johnson,—and Webster adopts the definition, (*a*)—defines "Beadsman" thus,—"A man employed in praying, generally in praying for another," and he quotes the following lines from Spenser's Faerie Queene, Book I., Canto x. 36,— [*416]

"An holy hospitall
In which seven *bead-men*, that had vowed all
Their life to service of High Heaven's King."

And he also quotes a portion of Proteus's farewell to Valentine, from "Two Gentlemen of Verona," Act 1, Scene 1,—

"Wilt thou begone? Sweet Valentine, adieu!
Think on thy Proteus, when thou, haply, seest
Some rare note-worthy object in thy travel:
Wish me partaker in thy happiness,
When thou dost meet good hap; and, in thy danger,
If ever danger do environ thee,
Commend thy grievance to my holy prayers,
For I will be thy *beadsman*, Valentine."

(*a*) Richardson gives the following quotation from "The Thief and the Cordelier," by Prior,—

"'Tell your beads,' quoth the priest, 'and be fairly truss'd up,
For you surely to-night shall in Paradise sup.'"

Dr. Nares, in his Glossary, has it thus,—"Beadsman. From *bede*, a prayer, and from counting the beads the way used by the Romish church in numbering their prayers; a *prayer-man*. Commonly one who prays for another." And he refers to the same passage in Shakspeare. He further says: "The *office* of a *beadsman* is thus expressed by Herrick,

> "Yet in my depth of grief I'd be
> One that should drop his beads for thee."

Bailey also defines "Beads-men," "persons devoted to prayer, who, in
*417] a chantry or religious house (in *popish times) said a certain sett of prayers for patrons, having an allowance for performing the said office:" and he gives the passage from Spenser above cited. The circumstance of the office having in modern times become a sinecure, makes no difference. Dr. Johnson describes a sinecure to be "an office which has revenue without employment." [COCKBURN, C. J.—A man may be devoted to prayer, and yet not hold an office.] The term beadsman is, as appears from the authorities cited, a recognised term to express one who is devoted under a vow to prayer. "Office" is a word of the largest signification possible. [COCKBURN, C. J.—Would you say that a monk is an officer?] Offices are of infinitely various descriptions: and the question is, whether this is not an office within the fair and reasonable construction of the statute. Dr. Johnson defines an office to be "a public charge or employment," or a "particular employment." In Com. Dig. *Franchises*, it is "a right to exercise a public or private employment, and to take the fees and emoluments belonging to it." In Cruise's Digest, Vol. III., p. 92, it is said, "an office is a right to exercise a public or private employment, and to take the fees and emoluments belonging to it." A similar definition is given in 2 Bl. Comm. 36. The word office is manifestly comprehensive enough to embrace an employment of this sort. It is not necessary that it should be a thing falling within the statutes of 5 & 6 Ed. 6, c. 16, and 49 G. 3, c. 126.(*a*) An endowed schoolmaster,(*b*) a curate,(*c*) a dissenting minister,(*d*) and a Roman Catholic priest,(*e*) though they do not hold
*418] "offices" in the strict legal sense, are yet entitled to *vote in respect of lands held by them as such. Amongst offices may be mentioned the ancient one of "Tubman" in the Exchequer, the origin of which seems to be involved in impenetrable mystery.

Field, for the respondents, was not called upon.

COCKBURN, C. J.—I entertain no doubt whatever that the decision of the revising barrister was right, and that the six persons whose names are mentioned in the case are not entitled to be upon the register. The question turns upon the 18th section of the Reform Act, 2 W. 4, c. 45, which abolishes the right of voting in respect of freeholds for life, except in certain specified cases, one of which is, where the lands or tenements in respect of which the right to vote is claimed shall have come to the party claiming by promotion to an *office*. The individuals in question are called "the Beadsmen of Daventry," and as such are entitled to receive a yearly sum out of the rents of certain lands. They

(*a*) See Hopkins v. Prescott, 4 C. B. 578 (E. C. L. R. vol. 56); Sterry v. Clifton, 9 C. B. 110 (E. C. L. R. vol. 67).
(*b*) See Elliott 23; Heywood's Co. El. 127; Rogers 122.
(*c*) See Rogers 122; Elliott 25.
(*d*) Heywood's Co. El. 130; Elliott 25; Rogers 125.
(*e*) Elliott 31.

are appointed by the bailiff and burgesses of Daventry, who are trustees under the wills of Edward Sawbridge and Mary Walford, to whom certain moneys had some time prior to the year 1776 been bequeathed upon trust to purchase lands and to apply the rents to various charitable purposes, amongst others, a portion thereof to and amongst the six beadsmen of Daventry. It appears that the whole of these six persons have been appointed since the passing of the Reform Act, and that, neither under the trusts above referred to, nor in their character as beadsmen, are they liable to be called upon to perform duties or services of any kind, nor have they ever been so called upon. The whole question is, whether their appointment as beadsmen is a "promotion to an office" within the meaning of the statute. I am clearly of opinion that there is nothing *in the facts stated to us by the revising barrister to warrant us in holding that they fill such an office as to entitle them to vote. I am far from saying, that, under some circumstances, beadsmen may not be persons holding an office,—for instance, if the appointment involved the performance of duties of a public character. But all that appears here, is, that these persons are appointed, and that they are the recipients of a yearly stipend or allowance. Beadsmen, according to the definitions given by the authors to whom we have been referred,—some of which are not often quoted in courts of law,—seem to have been in ancient times persons who devoted themselves to prayer,—not merely on their own account, but for the benefit also of others. There is nothing on the face of this case to show, and we cannot assume, that there are any duties attached to the appointment which would constitute it an office. I am not sure, that, in construing this act, we ought not to look at the state of things which existed at the time of its passing. And, assuming that persons of this description in former times had duties to perform, all such duties had ceased long since, and at the time of the passing of the act these persons were merely the recipients of charity. It is not necessary, therefore, in this case to lay down precisely what is and what is not an "office" within the meaning of the statute. It is enough to say that nothing has been brought before us on this occasion to satisfy us that these persons stand in the position of persons possessed of an "office" in respect of which the Act of Parliament intended that they should be entitled to vote. [*419

WILLIAMS, J.—I am entirely of the same opinion. Assuming the benefit which the beadsmen were entitled to under the trusts of the donors' wills to constitute an estate sufficient in point of description and value, if *within one of the exceptions, the question is, whether they came to that estate by promotion to an "office" within the meaning of the 18th section of the Reform Act. I am of opinion that there is nothing on the face of the case to show that they did. I quite agree with my Lord in thinking that it would be wrong to say that there may not be beadsmen who are appointed to an office which might bring them within the act,—men who might have duties to perform which would constitute in law an office. But here there is nothing to show that they owe any duty to anybody. There are twelve beadsmen attached to Westminster Abbey;(a) though what their duties at this day [*420

(a) Probably attached to the Hospital founded by Henry VII., which is thus alluded to in Dart's Westmonasterium, Vol. I., p. 32,—"He founded an Hospital for thirteen poor people, one of which to be a priest, and allowed the priest 6*d.* per week and the others 2½*d.* per week,

may be, I do not know: nor do I know whether they have ever claimed a right to vote or not.

Crowder, J.—I also am of opinion that the decision of the revising barrister was right. The simple question is whether there was evidence before him that the persons claiming to be retained on the register were persons possessed of an estate by promotion to an office within the meaning of the exception in the 18th section of the Reform Act. There is no evidence beyond the argument mentioned in the case, that the term beadsman necessarily imported the holding a "benefice, office, or employ-
*421] ment." It is possible, that, in former *times, some duties may have attached to the office of beadsman: but nothing is stated to justify the conclusion that that is so here. And I must beg to express my strenuous dissent from the assumption of my Brother *Hayes* that it was the intention of the framers of the Reform Act to confer the franchise in a case of this sort. I think, that, if the attention of parliament had been drawn to the subject, the probability is that they would most particularly have excluded these beadsmen, as well as all other recipients of charity.

Willes, J.—I am entirely of the same opinion. However the matter may be stated to raise an inference that these persons may in some former time have been appointed to some office in an ancient hospital, the only conclusion one can possibly arrive at upon the statement of this case, is, that they exist now solely for the purpose of receiving their yearly stipend under the trusts of the wills referred to. They are not persons promoted to an office, or to anything like an office. The appeal must be dismissed.

Field, for the respondents, asked for costs.

Hayes, Serjt., submitted that there was reasonable ground for the appeal, these votes never having been objected to before.

Willes, J.—The rule has always been, to dismiss the appeal with costs, where the respondent has not been called upon.

Appeal dismissed, with costs.

&c. All which, by agreement, the Abbot Islip obliged himself to perform, as did after him his successor Benson, who on Monday the 12th day of May, in the 20th year of the reign of King Henry VIII., came before the then Lord Chancellor Audley into Westminster Hall, between nine and ten in the morning, and entered into obligations for that purpose."

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*422] *County of DURHAM.—Northern Division.

WASHBOURNE WEST and Another, Appellants, JOHN STEPHENSON ROBSON, Respondent. *June* 12, 1858.

Lord Crewe, by his will, in 1720, devised lands in Hunstonworth, in the county of Durham, of the net yearly value of 735*l.*, and also lands in Northumberland, of the net yearly value of 5600*l.*, to five trustees in fee, upon trust out of the rents, &c., thereof to pay certain yearly sums to certain persons, amongst others, "the yearly sum of 10*l.* apiece to each of the fellows of Lincoln College, Oxford,"—the aggregate of such yearly sums being 740*l.*; and he directed that all the annual payments to be so made should be made to the bursar of the college for the time being, to be by him paid for the uses aforesaid:—

Held, that the fellows were not owners of a *rent-charge*, there being no power of distress; nor of a rent of any sort of the value of 10*l.* a year *issuing out of lands in Durham.*

Held also, that their interest was not an estate coming to them *by devise* within the meaning

of the 18th section of the Reform Act, 2 W. 4, c. 45,—or by promotion to a *benefice* or *office* within that section.

Whether they could be considered as cestuis que trust in actual occupation of any part of the lands, so as to be entitled to freeholds at all,—*quære?*

But, held, that, at all events, they were not possessed of freeholds of the value of 40*s.* a year in Durham, inasmuch as the net proceeds of the lands in the two counties must be rateably apportioned for the payment of all the sums charged thereon under the will, and, so apportioning them, the value in Durham was not sufficient to give each of the donees 40*s.* per annum.

Before the revising barrister, five objections were taken to a party's right to vote: three of them he overruled; but the others he held to be valid, and rejected the vote. The claimant appealed against this decision. *Quære*, whether, upon the argument of the appeal, it was competent to the respondent to rely upon the objections which had been so overruled, but the decision upon which had not been appealed against?

AT a court held for the revision of the lists of voters for the Northern Division of the county of Durham, Octavius Ogle and Washbourne West respectively claimed in writing, pursuant to the statute in that behalf, to be entitled to vote in the election of knights of the shire for the Northern Division of the said county, and to have their names respectively inserted in the list of voters for the said division, in the township and parish of Hunstonworth, in the said division; and John Stephenson Robson, being a person on the register of voters for the said division, duly objected to the said several claims of the said Octavius Ogle and Washbourne West.

The nature and local description of the qualification of Ogle and West, as stated in the claim, were as follows, viz. the nature of the qualification in the third column was "rent-charge," and the local description in the fourth column was, "William Nicholas Darnell, clerk, and the four other acting trustees under Lord Crewe's will, owners," the property situate "in the parish of Hunstonworth."

The facts of the case, as proved, were as follows:—*Lord Crewe being seised in fee of certain lands, tenements, and hereditaments, in the township and parish of Hunstonworth, in the county of Durham, and also of other lands, tenements, and hereditaments in the county of Northumberland, by his will, dated the 24th of June, 1720; and properly executed (and attested) to pass real estates, devised all the said lands, tenements, and hereditaments to five trustees named in the said will, their heirs and assigns for ever, upon the following trusts, viz. upon trust that they the said trustees, and the survivors and survivor of them, and the heirs and assigns of the survivor of them, should, out of the rents, issues, and profits of the said lands, tenements, and hereditaments in the said counties of Durham and Northumberland, for ever thereafter pay or cause to be paid the yearly sum of 20*l.* to each and every of twelve exhibitioners of Lincoln College in the University of Oxford, which he had then already named and appointed, or which he should thereafter nominate and appoint, and to each and every of twelve exhibitioners to be elected and chosen after his decease, as thereinafter mentioned, as should be undergraduate commoners in Lincoln College aforesaid, and who were or should be natives of the diocese of Durham, and, for want of such natives, of Northallertonshire, Howdenshire, in the county of York, or of Leicestershire, and particularly of the parish of Newbold Verdon, or of the diocese of Oxford, whereof he was formerly bishop, or of the county of Northampton, in [*423

which county he was born (with certain directions and limitations for electing fresh exhibitioners in case of vacancies, and as to the time and conditions of the holdings of the said exhibitions, not material in the judgment of the revising barrister to the present cases); upon the further trust, that the said trustees, their heirs and assigns, should, out
*424] of the rents, issues, and profits of the said lands, *tenements, and hereditaments in the said counties of Durham and Northumberland devised to them as aforesaid, for ever thereafter pay the annual sums thereinafter mentioned, that is to say, unto the minister of the parish church of Bamborough, in the county of Northumberland, and his successors, the yearly sum of 40*l.* per annum, and to the minister of St. Andrew's, Auckland, in the county of Durham, and his successors, the yearly sum of 30*l.*, and the yearly sum of 10*l.* apiece for the augmentation of twelve poor rectories, vicarages, small livings, or curacies in the diocese of Durham, such as he should by any writing or writings, codicil or codicils, under his hand and seal, to be attested by three or more credible witnesses, from time to time direct and appoint, and, in default thereof, to and for the augmentation of twelve such poor rectories, vicarages, small livings, or curacies within the diocese of Durham aforesaid, as the same trustees, and the survivors and survivor of them, and the heirs and assigns of the survivor of them, should direct and appoint; and unto the ministers, lecturers, or curates of the parishes of All Saints and St. Michael's, in Oxford, of Twyford, in the county of Bucks, and of Comb, in the county of Oxford, which belonged to Lincoln College aforesaid, and to their several successors for the time being, the several yearly sums of 10*l.* apiece, for catechising youth within the same respective parishes; and unto the poor scholars of Trap and Marshall in Lincoln College aforesaid (being eight in number) such annual sums as would make up and increase their respective scholarships to the yearly sums of 10*l.* apiece (including what they then already respectively received on account of their several scholarships), to the intent that their respective scholarships might be all alike in their respective yearly values; and to the bible clerk of Lincoln College
*425] aforesaid such annual sum as would make up and *increase his salary to the yearly sum of 10*l.* (including what he then already received on account of his clerkship); and also the yearly sum of 20*l.* to the rector of the said college, and the yearly sum of 10*l.* apiece to each of the said fellows of the said college, which benefactions he gave to the said rector and fellows of Lincoln College aforesaid, and to the college aforesaid, being the place where he had had his education, and of which college he was first fellow, and afterwards rector; and to each of the almsmen and almswomen in each of the hospitals in Durham and Bishop Auckland, of the foundation of Bishop Cosens, and to each of the six almswomen in the hospital of Brackley, in the county of Northampton, of the foundation of his grandfather, Sir Thomas Crewe, and to each of the two almswomen in the hospital at Hinton, in the said county of Northampton, of the foundation of Elisha Hele, Esq., the several yearly sums of 40*s.* apiece; and to such schoolmaster of Newbold Vernon aforesaid for the time being, the yearly sum of 20*l.*; and to the trustees for the time being of the hundred of Spackenhoe, in the county of Leicester, for the relief of the widows, orphans, and children

of poor clergymen deceased, and to their successors, the yearly sum of 10*l.*, to be by the said trustees and their successors distributed for the relief of widows, orphans, and children of poor clergymen deceased, within the said hundred, in such proportions as the said trustees and their successors should think fit; and, unto the minister and churchwardens of the parish of Daventry, in the county of Northampton, and to their successors, the yearly sum of 6*l.*, to be by them paid and applied for and towards the support and maintenance of a charity school to teach poor children of the said parish of Daventry to read English and write;—All which said payments he willed and desired should be for ever thereafter paid in manner following, that is to say, *unto the said almsmen and almswomen, by quarterly equal payments, [*426 on the feasts of St. Michael the Archangel, St. Thomas the Apostle, the Annunciation of the Blessed Virgin Mary, and St. John the Baptist,—the first payment to begin and be made at such of the said feasts which should first or next happen after his decease; and all other the annual payments by half-yearly equal payments, at the feast of St. Michael the Archangel and Annunciation of the Blessed Virgin Mary,—the first payment thereof to begin and be made at such of the same two last-mentioned feasts which should first and next happen after his decease: And the testator by his said will did will, order, and direct that all the said annual payments by him directed to be paid to the said rector, fellows, exhibitioners, poor scholars of Lincoln College aforesaid, and to the said ministers, lecturers, or curates of All Saints, St. Michael's Twyford, and Comb aforesaid, and to the bible clerk, should be from time to time received by the bursar of the said college for the time being, as other rents of the said college were by him received, to be by him paid for the uses aforesaid, and for no other use or uses whatsoever,—whom the testator thereby required to give security to pay the money coming to his hands by virtue of that his will to the uses aforesaid, to the satisfaction of the rector and fellows of the college aforesaid: And his will was, and he did thereby direct, that all the said annual payments for ever thereafter should be made without any deduction or abatement whatsoever for taxes, charges, or assessments for or by reason of any act or acts of parliament then already made or thereafter to be made, or by reason or means of any other payments, matter, or thing whatsoever, and to begin to be made in manner as he had thereinbefore directed.

Then followed directions as to the application of the *surplus rents [*427 "after the said annual payments should be made, and not before," which the revising barrister did not think material to be set forth.

The will contained a clause for the election and appointment of new trustees from time to time, on the death of any one or more of the trustees appointed by the will, so as the trustees should never exceed five in number, and providing that the rector of Lincoln College for the time being should be one of the trustees: and the will contained a further clause, directing that the trustees for the time being should be satisfied and paid their charges and expenses which they or any of them should be put unto, lay out, or expend in or about the execution of all, every, or any of the trusts aforesaid, or by reason of any matter or thing whatsoever anyways relating to or concerning that his will, or the trusts therein contained.

The trustees are and have been for several years past, James Thompson, rector of Lincoln College, Charles Thorp, William Nicholas Darnell, Henry George Liddell, and John Dixon.

Hunstonworth is a parish; and the parish and township are co-extensive.

Lincoln College is a corporation aggregate, styled "The Warden or Rector and Scholars of the Blessed Virgin Mary and All Saints, Lincoln, commonly called Lincoln College;" and the rector and fellows are respectively members of the body corporate. The said Octavius Ogle and Washbourne West are, and have been for several years, respectively, fellows of the said college.

The aggregate amount of the said several annual sums so by the said will primarily made payable out of the rents, issues, and profits of the said devised lands, tenements, and hereditaments in Durham and Nor-
*428] thumberland, is 740*l.* 6*s.* 8*d.*; and they are and always *have been paid out of a joint fund derived from the rents, issues, and profits of the whole of the said devised lands, tenements, and hereditaments in Durham and Northumberland, without distinction.

All the annual payments directed by the said will to be paid to the rector, fellows, exhibitioners, and poor scholars of Lincoln College, and to the ministers, lecturers, or curates of All Saints, St. Michael Twyford, and Comb aforesaid, and to the bible clerk, are and have always been paid by the said trustees to and received by the bursar of Lincoln College for the time being, to be by him paid to and for the uses aforesaid, pursuant to the direction of the said will; and the moneys so received by the bursar have never been nor are carried to the corporate funds of the college, but have always been and are by him distributed amongst and paid to the individuals entitled to receive the same, as directed by the said will. The rest of the said annual sums are paid by the trustees directly to the parties entitled to receive the same.

The gross annual rental of the said devised estates in Hunstonworth amounts to 800*l.* a year.

The ordinary management of those estates, including the collection of rents, costs the trustees from 25*l.* to 30*l.* a year; and the repairs incident to the same estate have on an average for the last twenty years cost the trustees from 40*l.* to 50*l.* a year.

The amount of the net annual rental of the Hunstonworth estates is less than the aggregate amount of the annual sums charged on those estates and the said estates in Northumberland.

Of the said devised estates in Northumberland, parts are situate in the Northern Division of the county, and the rest in the Southern Divison thereof. The amount of the gross annual rental of those parts
*429] which are situate in the Northern Division of Northumberland *is 6500*l.*; and the annual expenses incurred by the trustees for the ordinary management and repairs of those parts of the property, amount to 1500*l.* The gross annual rental of those parts which are situate in the Southern Division of Northumberland amounts to 1500*l.*; and the annual expenses incurred by the trustees for the ordinary management and repairs of those parts of the property, amount to 400*l.*

The qualification of the appellant was thus stated in the list of voters:—

HUNSTONWORTH.

Name.	Place of abode.	Nature of qualification.	If the qualification consists of rent-charges, the names of the owners of the property out of which the rent is issuing, and the situation of such property.
West, Washbourne.	Oxford.	Rent-charge.	William Nicholas Darnell, clerk, and the four other acting trustees under Lord Crewe's will, owners of the property situate in the parish of Hunstonworth.

It was objected on the part of the said John Stephenson Robson,—

First, that the statement of the nature and description of the qualifications of the said Octavius Ogle and Washbourne West in the register, as apparent on the face thereof, was imperfect and defective:

Secondly, that the qualifications of the said Octavius Ogle and Washbourne West, as described in the register, were not supported in fact; and that neither of them had a sufficient rent-charge or estate in Hunstonworth to qualify him to vote in the election of knights of the shire for the said Northern Division of Durham, because the said rent-charges issued out of the lands in Northumberland as well as those in Hunstonworth jointly:

Thirdly, that, if the said rent-charges ought to be *rateably and proportionably distributed over each division in each county, [*430 in proportion to the whole property in each division, and if such rateable and proportionable apportionment of the said rent-charges were made, or if any other apportionment which could be legally made were made, then and in any such case neither the said Octavius Ogle nor the said Washbourne West would have a rent-charge out of the lands in the parish of Hunstonworth of sufficient amount to qualify him to vote.

Fourthly, that the interest of the said Octavius Ogle and Washbourne West respectively in their said respective annuities was equitable merely; and that they could not elect to take their annuities out of the rents of the lands in Hunstonworth.

Fifthly, that the said Octavius Ogle and Washbourne West, being respectively members of the corporation aggregate of Lincoln College aforesaid, had not individually such an estate or interest in their said annuities as to qualify them, or either of them, to be on the said register of voters.

The revising barrister overruled the first, fourth, and last objections, and held the second and third objections to be valid, and rejected the said claims, and expunged from the list of claimants and the register of voters the several names of the said Octavius Ogle and Washbourne West; whereupon the parties objected to give notice of appeal, and their appeals were allowed, and consolidated.

Montague Smith, Q. C. (with whom was *Manisty*, Q. C.), for the appellants.—The decision of the revising barrister disallowing the votes of the appellants is clearly wrong. The statute is satisfied if each is shown to possess a freehold interest of the value of 40*s.* a year; for, it

*431] is an estate which comes to them *by devise* within *the exception in s. 18 of the Reform Act. They take, under the devise in Lord Crewe's will, an interest sufficient within the 6 H. 8, c. 7, 10 H. 6, c. 2, and 18 G. 2, c. 18, s. 5, to entitle them to vote,—an equitable rent-charge. [COCKBURN, C. J.—Is it an interest of the value of 40*s.* a year issuing out of lands in Durham?] It is. A rent-charge issues out of every part of the land, and therefore the whole is charged upon the lands in Durham. And the interposition of trustees makes no difference. [COCKBURN, C. J.—The money is to be paid to the bursar of Lincoln College.] His is merely the hand to receive it: the bequest is to the individuals. By the 5th section of the 18 G. 2, c. 18,—which was the principal statute which regulated the right of voting at the time of the passing of the Reform Act,—it was enacted "that no person should vote without having a freehold estate in the county for which he votes, of the clear yearly value of 40*s.* over and above all rents and charges payable out of or in respect of the same, or without having been in the actual possession or in receipt of the rents and profits thereof for his own use above twelve calendar months, *unless* the same came to him within that time by descent, marriage, marriage-settlement, devise, or promotion to a benefice in a church, or by promotion to an office." And the Reform Act has not interfered with that right. [CROWDER, J.—You contend that these parties had a right to vote for both counties?] It may be so. At all events, they have a clear right to vote for Durham. If an apportionment took place, there would still be enough to give more than 40*s.* a year in each county.

Hindmarch, (with whom was *J. R. Davison*), for the respondent.—The revising barrister has stated five objections to the right of the appellants to vote: and, if any one of those objections be well founded, *432] the appeal *cannot prevail; for it is the entire decision that is brought before this court for review. [COCKBURN, C. J.—The appellants do not appeal against that part of the decision which is in their favour.] The only object of putting all the points in the case, is, that the judgment of the court may be given upon them. [*M. Smith.*—In Ashmore, app., Lees, resp., 2 C. B. 31, 39 (E. C. L. R. vol. 52), where a similar point arose, Maule, J., says,—"The first and third objections having been disallowed by the revising barrister, and there being no appeal against his decision thereon, those points are not now open to discussion: we are only authorized by the 6 & 7 Vict. c. 18, s. 42, to enter into such questions of law as are reserved by the barrister for our opinion."] That was a mere dictum, and not the decision of the court. [WILLIAMS, J.—It seems to have been acquiesced in by the counsel, and acted upon by the court.] The 42d section enacts "that it shall be lawful for any person who, under the provisions hereinbefore contained, shall have made any claim to have his name inserted in any list, or made any objection to any other person as not entitled to have his name inserted in any list, or whose name shall have been expunged from any list, and who in any such case shall be aggrieved by, or dissatisfied with any decision of any revising barrister on any point of law material to the result of such case, either himself or by some person on his behalf, to give to the revising barrister in court, before the rising of the said court, on the same day on which such decision shall have been pronounced, a notice in writing that he is desirous to appeal, and in

such notice shall shortly state the decision against which he desires to appeal; and the said barrister thereupon, if he thinks it reasonable and proper that such appeal should be entertained, shall state in writing the facts which according to his judgment shall have been established by the evidence in the case, *and which shall be material to the matter [*433
in question, and shall also state in writing *his decision upon the whole case*, and also his decision upon the point of law in question appealed against; and such statement shall be made as nearly as conveniently may be in like manner as is now usual in stating any special case for the opinion of the Court of Queen's Bench upon any decision of any Court of Quarter Sessions," &c. That surely must mean the *whole* decision. [COCKBURN, C. J.—How can you bring before us by way of appeal a point upon which the revising barrister in allowing the appeal has not exercised his discretion? CROWDER, J.—The party appealing only appeals against that part of the decision which is against him. Suppose the revising barrister is called upon to state a case, and he merely states "A variety of objections were urged before me; and I overruled them all, and decided so and so," would it be competent to the court to entertain all the objections?] There is no reason why they should not. The point is one of great importance. [COCKBURN, C. J. —Is there any instance of a respondent being allowed to convert himself into an appellant in this way? If your argument be well founded, how is the 43d section,—"that, in the matter of every appeal, the party in whose favour the decision appealed against shall have been given shall be the respondent,"—to be carried out? WILLES, J.—If no reasons were given for the decision of the revising barrister, probably the whole would be open to you: and it may be a question whether you ought to be in a worse position because he has given bad reasons. COCKBURN, C. J.—What is the decision that is appealed against?] That the parties have not the right to vote which they affirm that they have. [COCKBURN, C. J.—The appeal is against a decision founded upon a particular point of law.] The 42d section expressly says that the barrister is to state his decision upon the *whole case. [*434
[WILLIAMS, J.—I incline to think with my Brother Willes, that the whole ought to be open.]

COCKBURN, C. J.—The point raised is of sufficient importance to require consideration. The argument had better be confined for the present to the points appealed against; and, should it become necessary, we will determine hereafter whether the respondent is entitled to go into the others.(*a*)

Hindmarch, continuing.—The thing described here is not a rent-charge at all. A rent-charge is a rent issuing out of land upon which the person entitled to the rent has a power of distress: Co. Litt. 143 b, 144 a. If the power to distrain does not exist, the rent is not a rent-charge, but a rent-seck. The evidence does not support the right to vote, as it appears upon the register. [WILLIAMS, J.—The revising barrister does not treat it as a variance: he speaks of this as "an objection." There is much technical matter which might have been avoided.] When this matter was in agitation last year, the qualifica-

(*a*) It is to be observed that there is no such provision in this act as there is in the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 41, that "the court of appeal shall give such judgment as ought to have been given in the court below."

tion was described as consisting of "annuity out of freehold lands,"—see Robson, app., Brown, resp., 1 C. B. N. S. 34 (E. C. L. R. vol. 87). This is not an interest in land. By the will of Lord Crewe, the whole property is devised to the trustees. They deal with it as they like. The trust attaches not on the land, but on the surplus money. It is not like the ordinary case of land devised to A. in trust for B., which would give the cestui que trust the right to vote. In Bligh *v.* Brent, 2 Y. & C. 268,†—where the question was, whether shares in the Chelsea Waterworks
*435] Company were personal *property, so as to pass by a will not executed according to the provisions of the statute of frauds,—Alderson, B., says: "It is of the greatest importance to look carefully at the nature of the property originally intrusted, and that of the body to whose management it is intrusted, the powers that body has over it, and the purposes for which these powers are given. The property is money,—the subscriptions of individual corporators. In order to make that profitable, it is intrusted to a corporation who have an unlimited power of converting part of it into land, part into goods; and of changing and disposing of each from time to time: and the purpose of all this is, the obtaining a clear surplus profit from the use and disposal of this capital for the individual contributors. It is this surplus profit alone which is divisible among the individual corporators. The land or the chattels are only the instruments (and those varying and temporary instruments) whereby the joint stock of money is made to produce profit." The barrister's decision in truth amounts to a finding that West and Ogle had not sufficient out of lands in Hunstonworth to entitle them to a vote. If there could be an apportionment,—which, it is submitted, is at least extremely doubtful,—it must be according to the proportionate value of the land in Northumberland and in Durham. Comparing their relative values, it would be found that each of these parties would have less than 40*s.* a year out of the lands in Hunstonworth. Then, can this rent or yearly sum be said to come to the parties by *devise?* The natural meaning of that expression in the act is, a disposition by will to a party directly: it cannot fairly include every person who at any time hereafter may be a fellow of Lincoln College. [COCKBURN, C. J.—The devise is to trustees, in trust for the benefit of certain persons who may for the time being happen to fill a
*436] certain position.] It comes to the *parties, not by devise, but by virtue of their appointment to the fellowship. [CROWDER, J.—Does the party get it by promotion to a benefice or office?] A fellowship clearly is not a "benefice;" and the revising barrister has not found that it is an "office." The nature and duration of the tenure do not appear,—whether for life or for years, or determinable in any other way; and, if so, an interest of the value of 40*s.* a year would not confer the right of voting; the parties must have 10*l.* a year at the least. [COCKBURN, C. J.—Much may turn on the nature of the tenure of these fellowships; generally, those who are elected to them are under an engagement to enter into holy orders within a limited period.] A further difficulty arises as to the expenses of collection and management and repairs, which are necessarily of uncertain amount, and might in some years reduce the value considerably below the sum required to constitute a qualification.

Montague Smith, in reply.—This case is clearly within the exception

in s. 27: these parties have an interest arising out of lands of the clear yearly value of more than 40*s.*,—whether coming to them by promotion to a "benefice" or to an "office," is immaterial. And it does not the less come to them by devise, by reason of the intervention of trustees: nor is the claim to vote the less valid because the recipients of this rent-charge have not a power of distress,—an equitable interest being equally available to confer the franchise: Baxter, app., Brown (or Newman), resp., 7 M. & G. 198 (E. C. L. R. vol. 49), 8 Scott N. R. 1019; 6 & 7 Vict. c. 18, s. 74. The charge is upon the whole and every part of the lands,—Rivis *v.* Watson, 5 M. & W. 255:† and the court is not called upon to make the apportionment as suggested. Cur. adv. vult.

*COCKBURN, C. J., now delivered the judgment of the court:(*a*)— [*437

It appears from the case, as stated, that Lord Crewe, by his will, in 1720, devised certain lands and tenements in the township and parish of Hunstonworth, in the county of Durham, and also other lands and tenements in the county of Northumberland, to five trustees, in fee, upon trust, out of the rents, issues, and profits thereof, to pay certain specified annual sums to twelve exhibitioners of Lincoln College, Oxford, to the ministers of certain parishes, to certain scholars, to the Bible clerk, and to the rector of Lincoln College; "and the yearly sum of 10*l.* apiece to each of the said fellows of the said college." And the testator directed that all the annual payments to be made should be received by the bursar for the time being, and paid over by him.

The two claimants whose votes were rejected by the revising barrister were fellows of Lincoln College, claiming to vote for the county of Durham as recipients of 10*l.* per annum under Lord Crewe's will.

The question as to their right to vote arises under the 18th section of the Reform Act, 2 W. 4, c. 45, which enacts "that no person shall be entitled to vote in the election of a knight or knights of the shire to serve in any future parliament, or in the election of a member or members to serve in any future parliament for any city or town being a county of itself, in respect of any freehold lands or tenements whereof such person may be seised for his own life or for the life of another, or for any lives whatsoever, except such person shall be in the actual and bonâ fide occupation of such lands or tenements, or except the same shall have come to such *person by marriage, marriage-settlement, devise, or promotion to any benefice or to any office, or [*438 except the same shall be of the clear yearly value of not less than 10*l.* above all rents and charges payable out of or in respect of the same; any statute or usage to the contrary notwithstanding: Provided always, that nothing in this act contained shall prevent any person now seised for his own life, or for the life of another, or for any lives whatsoever, of any freehold lands or tenements in respect of which he now has, or but for the passing of this act might acquire, the right of voting in such respective elections, from retaining or acquiring, so long as he shall be so seised of the same lands or tenements, such right of voting in respect thereof, if duly registered according to the respective provisions hereinafter contained."

It was contended, first, that the claimants had a right to vote as

(*a*) The case was argued before Cockburn, C. J., Williams, J., Crowder, J., and Willes, J.

owners of a rent-charge of 10*l.* per annum issuing out of lands in Durham. But it is clearly not a rent-charge, there being no power of distress. Moreover, it appears upon the case that the annual sums payable under the will amount to 740*l.*, and the whole net proceeds of the lands in Durham are less than that sum; so that they would be insufficient to pay the whole of such annual sums: and, consequently, the claimants must receive less than 10*l.* per annum.

Next, it was contended that the claimants had a right to vote as for an estate which came to them "by devise." They were elected to their fellowships, and then became entitled to the annual payments under Lord Crewe's will. We are clearly of opinion that this is not an estate coming to them "by devise," within the meaning of the 18th section.

*439] It was further contended that the fellowship was "an *office" within the meaning of that section. We are clearly of opinion that it is not.

The only remaining question under that section,—and which was principally argued before us,—was, whether the claimants were seised for life of any freehold lands, of the value of 40*s.* per annum, in the county of Durham, of which they were in the actual and bonâ fide occupation. It was contended, for the appellants, that they were seised for life of lands in Durham to that amount, as cestui que trusts in the actual receipt of the rents and profits thereof, and that this would enable them to vote, within the provisions of the 74th section of the 6 Vict. c. 18. Although 10*l.* per annum could not be realized from the lands in Durham if all the annual payments were made out of lands in that county; yet it was clear that much more than 40*s.* could be so realized.

But it was answered by the respondents, that the annual sums payable out of the lands in both counties must be rateably apportioned to the amounts respectively received from the lands in each county: and, if so, as it appears from the case that the net proceeds of the lands in Durham are at most 735*l.* per annum, and the net proceeds of the lands in Northumberland 5600*l.*, the proportion of those two sums being as one to between seven and eight, it follows that a much less sum than 40*s.* per annum would be apportioned from the lands in Durham to the payment of the appellants' 10*l.* per annum.

It was much discussed before us whether the appellants could be considered as cestui que trusts in the actual occupation of any part of the lands, so as to be entitled as freeholders at all. But we think it unnecessary to decide that point; because we are of opinion, that, assuming

*440] them to be such freeholders, the lands *in the two counties must be deemed to be rateably apportioned for the payment of the annual sums under the will, and that, consequently, the appellants would not hold freeholds of the value of 40*s.* per annum in the county of Durham.

We think, therefore, the revising barrister was right in disallowing the votes; and we give judgment for the respondents, but without costs.

Decision affirmed, without costs.

END OF MICHAELMAS TERM.

CASES

ARGUED AND DECIDED

IN THE

COURT OF COMMON PLEAS,

AND IN THE

EXCHEQUER CHAMBER,

IN

Michaelmas Vacation,

IN THE

TWENTY-FIRST YEAR OF THE REIGN OF VICTORIA, 1857.

MEMORANDA.

In the course of this Vacation, the Hon. Sir Cresswell Cresswell, Knight, resigned the office of Judge of the Court of Common Pleas, and was appointed Judge of the Court of Probate and Judge Ordinary of the Court for Divorce and Matrimonial Causes. He was afterwards sworn a member of Her Majesty's Privy Council.

John Barnard Byles, one of Her Majesty's Serjeants-at-Law, was appointed a Judge of the Court of Common Pleas, in the room of Sir Cresswell Cresswell. He took his seat on the first day of the ensuing Term, and shortly afterwards received the honour of knighthood.

*In this Vacation also, the following gentlemen were appointed Her Majesty's Counsel learned in the Law:— [*442

Evelyn Bazalgette, Esq., of Lincoln's Inn.
John Shapter, Esq., of Lincoln's Inn.
Samuel Bush Toller, Esq., of Lincoln's Inn.
Thomas Webb Greene, Esq., of the Middle Temple.
Francis Henry Goldsmid, Esq., of Lincoln's Inn.
Richard Paul Amphlett, Esq., of Lincoln's Inn.
James Fleming, Esq., of the Middle Temple.

LAWS and Another *v.* RAND. *Dec.* 6.

As between the drawer and the holder of a check, the former is not discharged by any delay in its presentment short of six years, unless some loss or injury is occasioned to him by such delay.

Presumption that an instrument is drawn at the time of its date.

THIS was an action by the holder against one of the alleged drawers of a banker's check.

The declaration stated that the defendant, by the name and style of Bedford & Rand, on the 30th of May, 1856, made his draft or order in writing for the payment of money, called a banker's check, and directed the same to a certain banking company called The Union Bank of London, and thereby required the said banking company to pay to R. Bedford or order 100*l.*, and then delivered the same to the said R. Bedford, who delivered the same to the plaintiffs, who still were the bearers thereof; and the said banking company did not pay the said check, although the same was presented to them for payment, whereof the defendant had due notice, but did not pay the same; and the said check was still unpaid.

The defendant pleaded, amongst others, a plea traversing the making of the check, and (fourthly) that the check was not presented to the said banking company within a reasonable time. Issue thereon.

*443] *The cause was tried before Williams, J., at the second sitting in London in Easter Term last, when the following facts appeared in evidence:—Messrs. Bedford & Rand entered into business in partnership together as saddlers, in Oxford Street, in January, 1856, and so continued until the 30th of January, 1857, when the partnership was dissolved, and notice of dissolution duly published in the London Gazette. The firm had an account with the Union Bank of London, which was closed on the dissolution of the partnership. The mode of drawing checks, according to the provisions of the deed of partnership, was, upon the separate signature of each of the partners: and a clerk of the bank, who was called, stated that checks drawn otherwise would not have been paid by the bank, even when they had funds belonging to the firm in their hands. The check in question, which was written on plain paper, was dated the 21st of May, 1856, and was signed by Bedford *in the name of the firm*, and payable to himself, but was not presented at the bank for payment until the 11th of March, 1857: and it was not handed over to the plaintiff in satisfaction of any liability of the firm. There was no evidence as to when the plaintiff became the holder of the check; nor was there any evidence as to *when it was drawn*.

On the part of the defendant, the only objection urged was, that the presentment was not made within a reasonable time.

On the other hand, it was submitted that a presentment at any time within six years would, in the absence of evidence to show that the defendant had been prejudiced by the delay, as by the failure of the bank, or the like, be a presentment within a reasonable time, as between the drawer and the holder.

The learned judge was of opinion that the reasonableness of the time

*444] of presentment was a question of law; *but that, assuming it was a question of fact, there was nothing for the jury, the presentment unquestionably not having been made within a reasonable time.

A verdict was thereupon entered for the defendant upon the fourth issue, and for the plaintiff on all the others,—the point on the fourth plea being reserved, and the court to be in the position of a jury thereon.

Honyman, in Easter Term, moved for a rule nisi to enter a verdict for the plaintiff on the fourth issue, pursuant to leave reserved, "on the ground of misdirection of the judge in ruling that the check was not presented within reasonable time." He cited Robinson *v.* Hawksford, 9 Q. B. 52 (E. C. L. R. vol. 58), where, to an action by the holder against the drawer of a check, it was held to be no answer that the check was not presented in reasonable time, unless, during the delay, the fund has been lost, as, by failure of the banker. [CRESSWELL, J.—Was there any proof of the time of the drawing of the check?] The *date* would be primâ facie evidence. [CRESSWELL, J.—I doubt that, under the circumstances. Bedford had no authority to draw checks in the name of the firm after the dissolution of the partnership.] The check must be assumed to have been drawn whilst the partnership was subsisting. It is laid down in Byles on Bills, 7th edit., p. 64, that the date expressed in the instrument is primâ facie evidence of the time when the instrument was made.

A rule nisi having been granted,

C. W. Wood, at the sittings after Trinity Term last, showed cause.—The question in all these cases, is, whether, under the circumstances, the check has been presented within a reasonable time; the stoppage of the bank in the interim being only one of the circumstances. In Serle *v.* Norton, 2 M. & Rob. 401, where *a check drawn on a country banker, dated the 19th of March, was not presented until the 6th [*445 of April, and no cause was assigned for the delay, but the drawer had not sustained loss by the non-presentment at an earlier period, the drawer was held liable to be sued on the check. The judgment of Lord Denman in Robinson *v.* Hawksford, 9 Q. B. 52 (E. C. L. R. vol. 58), is rather in the defendant's favour. He says: "Where a loss has occurred by the check not being presented, it is necessary to inquire if there was any unreasonable delay: and the loss itself would be some evidence of that fact." [COCKBURN, C. J.—There are some very pertinent remarks on the subject in the note to Serle *v.* Norton, 2 M. & Rob. 404, where it is said: "It is difficult to see how a solvent drawer, on a solvent banker, can be prejudiced by delay in the presentment of a check. By drawing such a check, he appropriates a sum of money then in his banker's hands to the payment thereof, and cannot honestly reduce his account below that amount: Boehm *v.* Stirling, 7 T. R. 429: and, as between him and the payee of the check, the question of reasonable time for presentment can scarcely arise, unless some damage has arisen in consequence of the non-presentment."] That note was referred to by Lord Denman in Robinson *v.* Hawksford. In the present case, the circumstances clearly show that the presentment was made at an unreasonably late period. The check was drawn in express contravention of the terms of the partnership deed. It was drawn by Bedford without the authority of Rand. The date, no doubt, is primâ facie evidence of the time of the drawing: Anderson *v.* Weston, 8 Scott 583, 6 N. C. 296 (E. C. L. R. vol. 37). But the delay in the presentment was some evidence to justify the jury in presuming that it was not drawn at the time

it bore date. It was incumbent on the plaintiff, the check being tainted with fraud, to show when he received it, and that it was given in satisfaction of a claim on the partnership.

*446] *Honyman*, in support of his rule.—The authorities are clear, that checks differ in this respect from bills of exchange and promissory notes,—that the holder is not bound to present them within any limited period short of six years, unless circumstances have intervened to alter the position of the drawer, so as to prejudice him. In Alexander *v.* Burchfield, 3 Scott, N. R. 555, 563, 7 M. & G. 1061 (E. C. L. R. vol. 49), Tindal, C. J., says: "In the case of a check, the holder does not lose his remedy against the drawer by reason of non-presentment within any prescribed time after taking it, unless the insolvency of the party on whom it is drawn has taken place in the interval; that is, unless there is actual loss to the drawer." And in Robinson *v.* Hawksford, 9 Q. B. 52 (E. C. L. R. vol. 58), Patteson, J., says: "As between the drawer of a check and the holder, if presentment is deferred to such a time that inconvenience has been sustained, the time may then be deemed unreasonable: but, if none has resulted, I see nothing unreasonable in a presentment, I should even say, at any time within six years." And Williams, J., says: "If the question arises who is to be the loser when the banker becomes unable to pay, the point is properly raised whether the check was presented in due time; but, if things remain the same, the check is still a check, and the money is money applicable to the payment; and I cannot conceive that the rule as to time applies." What is or is not a reasonable time necessarily varies according to circumstances. The authorities cited show that the plaintiff was entitled to recover, unless the delay in the presentment was shown to have damnified the defendant,—of which there was no evidence whatever. It was clear that, if the presentment had taken place at an earlier period, the check would not have been paid: the banker's clerk proved that. [CRESSWELL, J.—If the presentment had taken place before, the amount

*447] might *have been settled and allowed in account.] There was no evidence of any settlement of accounts. The onus lay on the defendant to show that he was damnified by what took place: no attempt was made to show that he was. As a general rule, it cannot now be doubted that there is a primâ facie presumption that all documents are made on the day they bear date: Anderson *v.* Weston, 6 N. C. 296 (E. C. L. R. vol. 37), 8 Scott 583; Smith *v.* Battens, 1 M. & Rob. 341; Potez *v.* Glossop, 2 Exch. 191;† Taylor on Evidence, 3d edit. Vol. I., p. 153, § 137. The drawing of checks is incident to modern partnerships. [COCKBURN, C. J.—It is a mere mode of payment: the power to draw checks is not vitally essential to a partnership.] Perhaps not essential; but very convenient. In Byles on Bills, 7th edit. 17, it is said: "There is one material difference between the liability of the drawer of a check and the drawer of a bill. The drawer of a check is not discharged by the holder's failure to present in due time, unless he have sustained from the delay actual prejudice, as, by the failure of the banker. The check is an absolute appropriation of a sum of money in the banker's hands to lie till called for; but by delay the holder takes the risk of the bank's failure." The cases of Grant *v.* Vaughan, 3 Burr. 1516, and Down *v.* Halling, 4 B. & C. 330 (E. C. L. R. vol. 10), 6 D.

& R. 455 (E. C. L. R. vol. 16), occurred at a time when the doctrine, now exploded, of reasonable care prevailed. Cur. adv. vult.

CRESSWELL, J., now delivered the judgment of the court:—(a)

This was an action on a check drawn on a banker, by one Bedford, in the names of Bedford and the *defendant, Rand, who were formerly in partnership. Plea, that the check was not presented within a reasonable time. [*448

The cause was tried before Williams, J., at the sittings in London in last Easter Term, when it appeared that Bedford and Rand were in partnership, and had an account with a banker, who was instructed not to pay checks unless signed by both. The check in question was made payable to Bedford, and was signed by Bedford in the names of both, but Rand did not sign it. Bedford and Rand dissolved partnership on the 31st of January, 1857, and then closed their account with their banker. The check in question bore date the 30th of May, 1856, and was presented on the 11th of March, 1857. The banker's clerk proved, that, if presented before the account was closed, it would not have been paid, not being signed by Rand. No evidence was given as to the time when the plaintiff became the holder; but no objection was made at the trial on that ground.

The learned judge directed a verdict for the defendant, the plaintiff having leave to move to enter a verdict for him, if the court should think that, according to the evidence, the check was presented in a reasonable time.

A rule was granted, and cause was shown against it at the sittings after Trinity Term last. It was then said that evidence should have been given of the time when the check was handed over to the plaintiff; but, no such point having been made at the trial, we think it could not with propriety be entertained afterwards; and the sole question to be disposed of is that which was reserved by the learned judge.

We are of opinion that the point was decided by the Court of Queen's Bench in Robinson *v.* Hawksford, 9 Q. B. 52 (E. C. L. R. vol. 58), where Patteson, J., said that no time less *than six years would be unreasonable, unless some loss was occasioned by the delay (there was no evidence of any loss here): and that was in conformity with what was said by Lord Chief Justice Tindal, in giving judgment in the case of Alexander *v.* Burchfield, 7 M. & G. 1067 (E. C. L. R. vol. 49), 8 Scott, N. R. 563. [*449

The rule for entering a verdict for the plaintiff must therefore be made absolute. Rule absolute.

(a) The case was argued before Cockburn, C. J., Cresswell, J., and Williams, J.

The same point in effect was decided beck *v.* Craft, 4 Duer 122; Tryon *v.* in Little *v.* Phœnix Bank, 2 Hill 425; Oxley, 3 Iowa 289: See Matter of Daniels *v.* Kyle, 1 Kelly 304; Har- Brown, 2 Story 516.

The Rev. WILLIAM KIRKPATRICK RILAND BEDFORD, Clerk, v. The Warden and Society of the Royal Town of SUTTON COLDFIELD.

SILVESTER v. The Rev. WILLIAM KIRKPATRICK RILAND BEDFORD, Clerk. *Dec.* 6.

By a local enclosure-act,—reciting that the defendants, amongst others, were owners and proprietors of old enclosed lands within the parish,—it was (by s. 61) provided that the tithes should be extinguished and certain yearly corn-rents substituted, such yearly rents to be "issuing and payable for ever from and out of the several lands and tenements to be charged therewith as aforesaid," and to be paid to the rector at the rectory-house on the four usual quarter days. The 62d section provided that the rector, in addition to all present powers for recovery of tithes and compositions, should have the same powers and remedies for recovering them as by common law or statute were given to landlords for the recovery of rack-rent in arrear. And the 63d section, having provided for the apportionment of the rent-charge in case of the division of the land, concludes by enacting that such apportioned part of the rent "shall and may be recovered from the lands or hereditaments so charged therewith, or *from the owners thereof*, in such and the same manner as the whole of the said yearly corn-rents or sums are hereby made recoverable:"—

Held, that the rector could not maintain an action against the owners of the land for the recovery of the rent-charge thus created.

Held also, that a distress by the rector for the amount of the rent-charge imposed upon lands of a proprietor acquired by him *before* the passing of the act, and also for the amount of the rent-charge imposed upon other lands in the parish acquired by him *since* the passing of the act, jointly, was illegal.

But held, by Williams, J., Crowder, J., and Willes, J.,—dissentiente Cockburn, C. J.,—that a distress might be levied, in respect of the whole rent-charge imposed on all the lands in the parish belonging to the same owner, upon an occupier of any part thereof.

THE first of these actions was brought by the Rev. Mr. Bedford, who
*450] is the rector of the parish of Sutton *Coldfield, in the county of Warwick, to recover from the defendants, as the owners and proprietors of certain lands in the same parish, a sum of 30*l.* 10*s.* 2*d.* for rent in lieu of tithe, as hereinafter mentioned.

The other action was brought by Silvester against the rector, for distresses made as hereinafter mentioned, to recover certain other sums of rent-charge.

As the facts involved in these actions are undisputed, and both depend upon similar questions of law, by consent of the parties and by order of a judge, according to the Common Law Procedure Act, 1852, the following case has been stated in both actions for the opinion of the court, without pleadings:—

By a private act of parliament passed in 5 G. 4 (c. 14), intituled "An act for enclosing lands within the Royal town, manor, and lordship of Sutton Coldfield, and the parish of Sutton Coldfield, in the county of Warwick," it was enacted in the 1st, 61st, 62d, 63d, and 64th sections,—which are the only portions of the act material to the present purpose,—as follows:—

Sect. 1. "Whereas there are within the Royal town, manor, and lordship of Sutton Coldfield, and the parish of Sutton Coldfield, in the county of Warwick, certain open and common fields and meadows, and also certain commons, commonable and waste lands: and whereas the worshipful the Warden and Society of the Royal town of Sutton Coldfield, in the county of Warwick, claim to be lords of the manor of Sutton Coldfield aforesaid, and as such are or claim to be entitled to the soil of the several commons and waste lands within the said manor: And whereas William Bedford, Esq., is patron of the rectory and parish church of Sutton Coldfield afore-

said, within the Royal town, manor, and lordship of Sutton Coldfield aforesaid, and the Rev. William Riland Bedford, clerk, is the present rector thereof, and as such is entitled to certain glebe lands, *and right of common in respect thereof, and claims to be entitled to all the great [*451 and small tithes yearly or otherwise arising or renewing within the said parish of Sutton Coldfield, or to certain moduses or compositions in lieu thereof, if any such legally exist: And whereas the said warden and society, Sir E. C. Hartopp, Bart., Sir R. Peel, Bart., F. B. Hacket, Esq., W. H. C. Floyer, Esq., C. Chadwicke, Esq., John Scott, Esq., the Rev. James Scott, J. Whitehead, Esq., the Master and Fellows of Emanuel College, Cambridge, and the said William Bedford, and other persons, are owners and proprietors of certain enclosed lands and estates within the said lordship and parish of Sutton Coldfield, and also of the said open and common fields, meadows, commons, and waste lands, or to certain rights of common or other rights in, over, and upon the same: And whereas an act was passed in the 41st year of the reign of His late Majesty, King George the Third, intituled 'An act for consolidating in one act certain provisions usually inserted in acts of enclosure, and for facilitating the mode of proving the several facts usually required on the passing of such acts:' And whereas another act was passed in the 1st and 2d years of the reign of His present Majesty, intituled 'An act to amend the laws respecting the enclosing of open fields, pastures, moors, commons, and waste lands in England:' And whereas the properties in the said open and common fields and common meadows lie very much intermixed with each other, and are in their present state incapable of any considerable improvement, and it would be advantageous to the several persons interested therein and in the said commons and waste lands, if the said open and common fields, meadows, commons, commonable and waste lands were divided and enclosed, and specific allotments made thereof to the several persons interested therein, according to their several rights and interests, *and if compensation were made for the tithes of all [*452 and every the lands and estates aforesaid, in manner hereinafter mentioned; but such division, allotment, enclosure, and compensation for tithes, cannot be effectually made without the aid and authority of parliament: Be it enacted, &c., that John Harris, of, &c., surveyor, shall be and he is hereby appointed the commissioner for valuing, setting out, dividing, allotting, and enclosing all the said open and common fields, meadows, commons, commonable and waste lands, and for putting this act and the said recited acts into execution, subject to the rules, orders, and directions hereinafter mentioned, and with such powers, directions, and regulations as are contained in the said recited act, except in such cases only as the same are hereby varied or altered."

Section 61. "And whereas it is proposed and agreed that all tithes whatsoever arising out of, for, or in respect of any old enclosed lands, tenements, or hereditaments within the parish of Sutton Coldfield aforesaid, and payable to the rector of the said parish for the time being, shall cease and be for ever extinguished; and that, in lieu thereof, yearly rents or sums of money shall be ascertained and paid to the rector of the said parish for the time being, in manner hereinafter mentioned: be it therefore further enacted that it shall be lawful for the said commissioner, and he is hereby required, to make a just and true valuation according to the average prices of wheat in the corn market in the city of London,

for the seven years preceding the passing of this act, of all the tithes, both great and small, issuing or payable out of, for, or in respect of all the old enclosed lands and tenements in the parish of Sutton Coldfield aforesaid, subject to the payment of tithes in kind, or any moduses or other compositions, if any such shall be proved to exist, to the said *453] rector, in *order to enable him, the said commissioner, to fix and ascertain the total aggregate annual amount which in his judgment is a just, fair, and equal compensation and satisfaction to be made to the said rector and his successors in lieu of all such tithes and moduses or other compositions, if any: and the said commissioner, after ascertaining such aggregate annual amount, shall also ascertain and determine what yearly sums of lawful money of Great Britain, according to such aggregate annual amount, are equivalent to the tithes and moduses or other compositions, if any, of each proprietor's old enclosed lands and tenements within the said parish; which said yearly sums shall be yearly charged upon the old enclosed lands and tenements of the respective proprietors, as yearly rents payable thereout respectively to the said rector and his successors, in lieu of the tithes thereof: *and the same rents shall accordingly be and are hereby charged on the said several enclosed lands and tenements of the several proprietors;* and, for the purpose of hereafter regulating the amount of such yearly rents according to the price of good marketable wheat, at such times as hereinafter mentioned, the said commissioner shall also ascertain the quantity of good marketable wheat each of the several yearly sums so to be ascertained as aforesaid should in his judgment purchase, and the said commissioner shall set forth the several particulars hereinafter directed to be ascertained in his award; *and the several yearly rents or sums to be ascertained and set forth as aforesaid,* subject to such variations as is hereinafter provided for, *shall be issuing and payable for ever from and out of the several lands and tenements to be charged therewith as aforesaid;* and the same yearly rents *shall be payable and paid to the said rector and his successors at the rectory-house* of Sutton Coldfield aforesaid, by four equal quarterly *454] payments in every year, on the 25th of March, the 24th *of June, the 29th of September, and the 25th of December in every year,— the first payment thereof to begin and be made on such of the said quarterly days as the said commissioner shall direct by the same award, or by any notice in writing to be given and published previous to the execution of the said award, in like manner as hereinbefore is mentioned with respect to the meetings of the said commissioner."

Sect. 62 enacts "that *the said rector* and his successors *shall* and may, in addition to all present powers for recovery of tithes and compositions, *have and exercise such and the same powers and remedies for recovering the said yearly rents or sums of money when in arrear, as by common law or statute are provided and given to landlords for the recovery of rack-rent when in arrear:* Provided, nevertheless, that, whenever the said rector or his successor shall, by death or otherwise, cease to be entitled to such yearly rent or sum, his executors or administrators shall be entitled to receive a proportionable part of such rent or sum, up to the day of his so dying or ceasing to be entitled."

Sect. 63. "And, in order to prevent any difficulty to the said rector and his successors by the division or sale of the hereditaments to be charged with such yearly corn-rent or sum of money, and to faciliate the

future regulation of the same, be it enacted that the said commissioner shall and he is hereby required to make or cause to be made two complete schedules or descriptions of the several hereditaments which shall be chargeable with the said yearly corn-rent or sum, and the particular measure thereof, in acres, roods, and perches, and to declare what proportion thereof shall be charged upon each and every part of such respective hereditaments and the quantity of wheat which is to govern the said future yearly corn-rent or sum, and such other requisites as shall be judged necessary and *proper by the said commissioner to render every matter respecting the same clear and plain in future; [*455 which said schedules or descriptions shall be signed by the said commissioner, and one of them shall be deposited in the bishop's court at Lichfield, and the other annexed to the commissioner's award; and that, upon any division of such hereditaments by sale or otherwise (except by lease or demise at rack-rent), the hereditaments so to be sold or divided shall from thenceforth be and become respectively, exclusively and solely liable to the payment of so much of the said yearly corn-rent or sum as shall be specified in such schedules or descriptions, in exoneration of the other hereditaments hereby charged with the payment of the whole of the said yearly corn-rent or sum; and that such apportioned part thereof shall and may be recovered from the lands or hereditaments so charged therewith, *or from the owners thereof*, in such and the same manner as the whole of the said yearly corn-rents or sums are hereby made recoverable."

Sect. 64. "Provided always, and be it further enacted, that it shall be lawful for the said rector of the parish of Sutton Coldfield, and his successors for the time being, or for any two or more of the *owners or proprietors* of lands or tenements hereby made liable to the payment of yearly tithe-rents to the said rector and his successors, at his or their respective proper expense, by writing under his or their respective hands to apply at their first general or quarter sessions of the peace to be holden in or for the said county of Warwick after the expiration of seven years to be computed from the commencement of the said yearly rents, having given thirty days' previous notice of such intended application in the said Aris's Birmingham Gazette, or in some other newspaper usually circulated in the said county of Warwick, and on the principal outer door of the parish *church of Sutton Coldfield aforesaid, to have one proper and disinterested person named or appointed by the [*456 justices then and there ssembled, for the purpose of ascertaining by the London Gazette the average price of a Winchester bushel of good marketable wheat in the corn market in the city of London for seven years then last past: which said person to be appointed as aforesaid for that purpose shall thereupon by his report to be made and delivered to the court of quarter sessions to be held after the feast of the Translation of St. Thomas the Martyr then next ensuing, set forth such average price; and, in case it shall by such report appear that such average price of a bushel of good marketable wheat is more or less than the price of a bushel of such wheat as set forth in the said award, by the value of 3*d.*, the said respective yearly tithe-rents and the several proportions thereof shall be increased or diminished accordingly in the same proportions as the said average price shall appear to have increased or diminished, which shall be declared by the said court, and the said several yearly tithe-rents so re-ascertained as aforesaid, shall, at and from the quarterly day of

payment next after such order, be a charge upon, and be, remain, and continue issuing and payable to the said rector and his successors out of the several old enclosed lands and tenements to be charged by the said award with such respective yearly tithe-rents as aforesaid, for the term of seven years then next ensuing, and until the same shall afterwards upon a like application be again varied according to the average price of wheat during the term of seven years then last past, to be ascertained in manner aforesaid; and such future applications the said rector and his successors, and any two or more of such owners or proprietors, are hereby respectively authorized to make from time to time at the expiration of every term of seven years for ever, in such and the like manner *and form as hereinbefore are mentioned and directed with respect to the first application; but the costs and charges of every such application to the court of quarter sessions, and of varying and re-ascertaining such several yearly rents or sums as aforesaid, shall be paid and discharged by the person or persons who shall give notice of any such application."

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After the passing of this act, Mr. John Harris, the commissioner therein named, duly made his award in accordance with the provisions of the 61st section: and he also made, in accordance with the provisions of the 63d section, two schedules or descriptions of the hereditaments charged with the said yearly corn-rent or sum, and the particular measure thereof in acres, roods, and perches, and declared what proportions thereof should be charged upon each and every part of such respective hereditaments, and the quantity of wheat which was to govern the said yearly corn-rent or sum, and such other requisites as he the commissioner judged necessary and proper for the purposes mentioned in that behalf in the said 63d section.

The Rev. William Kirkpatrick Riland Bedford is now, and has been for some years past, the rector of the said parish of Sutton Coldfield, and as such is entitled to the said yearly rent or sum payable in lieu of tithe to the rector of the said parish for the time being by virtue of the provisions of the said act and the said award and schedules made in pursuance thereof. The said Warden and Society of the Royal town of Sutton Coldfield are a corporation duly established by charter, capable of suing and being sued in their corporate name; and they were at the time of the passing of the said act, and still are, the owners and proprietors of certain lands comprising a considerable portion of the said parish.

A copy of one of the said schedules made by the said *commissioner, so far as it relates to the said lands of the said warden and society, was annexed to the case, with all the particulars relating to the said lands which are given in the said schedule.

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The first column of the said schedule contains the name of the said warden and society as being the proprietors of the said lands; the second column contains the names of the several occupiers of such of the said lands as were not in the actual possession of the said warden and society at the time when the schedule was made; the third column contains the numbers by which each of the different fields or tenements is distinguished upon the plan made under the direction of the commissioner; the fourth column contains the names or description of those fields or tenements; the fifth column describes the quantity of land contained in each field or

(A Specimen of) The Schedule referred to in the Case.

Proprietor's names.	Occupier's names.	No. on the plan.	Names of fields.	Quantity. A.	R.	P.	Tithe rent per acre.	Amount of Tithe-rent. £	s.	d.	Quantity of corn payable. Bush.	Decs.
Warden and Society of Sutton Coldfield . .	Careless, William .	3	Big Croft . . .	1	1	18	5s.		6	9¾		851
		4	Meadow	2	0	15			10	5½	1	308
		5	Little Croft . . .		2	6			2	8½		336
		6	Cottage and garden		1	12			1	7½		203
				4	1	11		1	1	7	2	698
	Allport, John . .	7	Further Croft . .	1	2	24	6s.		9	11	1	238
		7.a.	Cottage and garden		1	26			2	5¾		309
				2	0	10			12	4¾	1	547
	Milner, Joseph . .	8	Pleck	1	2	10	5s.		7	9¾		977
		8.a.	Cottage and garden		2	6			2	8¼		336
				2	0	16			10	6	1	313
	Rice, John . . .	Pt. 10 Pt. 11	Orchard, &c. . .		2	17	5s.		3	0¼		378
		Pt. 13 15	Close	1	1	0			6	3		782
		Pt. 14	Upper close . .		1	5			1	4¾		175
				2	0	22			10	8	1	335

tenement; the sixth column states the rate per acre at which the said lands are charged with the said rent; the seventh column states the annual amount of rent chargeable at the time the said schedule was made upon each of the said fields or tenements; and the eighth column states the quantity of wheat upon which the said rent is to be calculated in respect of each field or tenement.

It was agreed that an entire copy of the schedule should be in court when the case came on to be heard, and might be referred to if necessary: and that the said copy of the schedule and the said act of parliament of the 5 G. 4, c. 14, should be taken as part of the case.

At the time when the said schedule was made, the said several persons mentioned in it as occupiers of lands under the said warden and society were tenants of the same respectively at rack-rent: and, although some of the said lands are now occupied by other persons than those who were named in the said schedule, *those lands have been continuously held since the said schedule was made by tenants at rack-rent.

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From the time of the commissioner making his said award and schedule, up to the 29th of September last, a period of thirty years, the rector and his predecessor have received from the occupiers of lands in the parish for the time being so much of the rent-charge as has been paid during that period.

On the 25th of December, 1855, the sum due to the said rector for the said rent in respect of the whole of the said lands within the said parish of which the said warden and society were then the owners and proprietors, was 80*l.* 10*s.* 2*d.*, which is the sum claimed by the said rector in the first of these actions.

On the 25th of March, 1856, a further sum of 19*l.* 9*s.* 1*d.* became due to the said rector for the said rent, in respect of the whole of the said lands within the said parish of which the warden and the society were then the owners and proprietors (a portion of which lands they had acquired by purchase since the making of the award); and for this last-mentioned sum a distress was levied by the said rector on the 18th of this present month, upon a portion of the said lands, which is, and was on the said 25th of March, 1856, in the occupation of George Silvester, the plaintiff in the second of the above-mentioned actions, one of their said tenants at rack-rent.

On the 24th of June, 1856, a further sum of 8*l.* 14*s.* 8*d.* became due to the said rector for the said rent in respect of that portion of the said lands of which the said warden and society were the owners and proprietors at the time of the passing of the said enclosure act, and have since continually been, and still are, the owners and proprietors: and for the last-mentioned sum another distress has been levied by the said rector on the said 18th of this present month, upon the lands of the *said George Silvester as such tenant as aforesaid, being part of the lands in respect of which the said last-mentioned sum became due.

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The last of the above-mentioned actions has been brought by the said George Silvester against the said rector for damages for taking the said distresses: and it is agreed, that, if the said rector was wrong in taking the first of the said distresses, the damages recoverable by the said George Silvester shall be 19*l.* 9*s.* 1*d.*: and, if the said rector was wrong in taking the last of the said distresses, the damages shall be 8*l.* 14*s.* 8*d.*

The said rector contends,—first, that he has a right to maintain the said

action against the said warden and society for the whole of the said sum of 30*l.* 10*s.* 2*d.*,—secondly, that he had a right to distrain for the whole sum of 19*l.* 9*s.* 1*d.*,—thirdly, that he had a right to distrain for the said sum of 8*l.* 14*s.* 8*d.*

The said warden and society and the said George Silvester contend, —first, that the said rector is not entitled to maintain the first of these actions at all,—secondly, that the said rector was not entitled to make either of the said distresses,—thirdly, that the said rector can only distrain (if at all) upon each tenement numbered in the said schedule, for the rent due in respect of that tenement,—fourthly, that the rector is only entitled to distrain (if at all) upon the lands of each occupier in the said parish for the rent due in respect of such lands, although they may be held by him at rack-rent from several different owners or proprietors.

The questions for the opinion of the court are,—first, whether, under the circumstances stated, the plaintiff in the first of these actions is entitled to recover the said sum of 30*l.* 10*s.* 2*d.*,—secondly, whether the defendant in the said last-mentioned action was entitled to take the said distresses, or either of them.

*It was agreed that judgment should be entered in either action, according to the opinion expressed by the court, and that the costs were to be paid in accordance with the terms of the order of the 20th of May, 1857. [*462

Bovill, Q. C. (with whom was *Garth*), for the plaintiff in the first action.—The substantial question is, whether the rector has a right to proceed for the recovery of the rent-charge against the owner, as distinguished from the occupier of the lands. A further question arises in respect of lands acquired since the making of commissioner's award. And again a further question, as to the form of the remedy,—whether by action or by distress, and, if by distress, in what form. The enclosure act passed in 1824. The 1st section recites that there were within the Royal town, manor, and lordship of Sutton Coldfield, and the parish of Sutton Coldfield, certain open and common fields and meadows, and certain commons, commonable and waste lands; that the warden and society of the Royal town of Sutton Goldfield were or claimed to be entitled to the soil of the commons and waste lands; that William Bedford, Esq., was the patron, and the Rev. William Riland Bedford, clerk, incumbent of the parish church of Sutton Coldfield, and as such entitled to certain glebe lands and rights of common in respect thereof, and claimed to be entitled to all the great and small tithes within the parish, or to certain moduses or compositions in lieu thereof; that the warden and society and certain other persons were *owners and proprietors* of certain enclosed lands and estates within the lordship and parish of Sutton Coldfield, and also of the said open and common fields, meadows, commons, and waste lands, or to certain rights of common or other rights in, over, and upon the same; and that it would be advantageous to the several persons interested therein, if the said lands were enclosed *and allotted: and it then proceeds to appoint a commissioner "for valuing, setting out, dividing, allotting, and enclosing all the said open and common fields, meadows, commons, commonable and waste lands, and for putting that act and the recited acts (41 G. 3, c. 109, and 1 & 2 G. 4, c. 123) into execution, subject to the rules, orders, and directions thereinafter mentioned, and with such powers, directions, [*463

and regulations as were contained in the said recited acts, except in such cases only as the same were thereby varied or altered. The 61st section enacts, that the tithes shall cease, and certain yearly rents be paid to the rector in lieu thereof, and that the commissioner shall make a valuation to enable him to fix the total aggregate annual compensation to be paid to the rector, and proportionate amount payable in respect of each proprietor's old enclosed lands, and that "the same rents shall accordingly be and they are thereby *charged on the said several enclosed lands and tenements of the several proprietors;*" and it then goes on to enact that "the several yearly rents or sums to be ascertained and set forth as aforesaid, subject to such variations as was thereinafter provided for, should be issuing and payable for ever from and out of the several lands and tenements to be charged therewith as aforesaid, and the same yearly rents should be payable and paid to the said rector and his successors *at the rectory house* at Sutton Coldfield aforesaid, by four equal quarterly payments, &c. Section 62 gives the rector the same remedies for recovering the rents as by law are provided and given to landlords for the recovery of rack-rent. And s. 63, after directing a schedule to be made specifying the amount charged on each of the several hereditaments, concludes with enacting "that, upon any division of such hereditaments by sale or otherwise (except by lease or demise at rack-rent), the hereditaments so to be sold or divided shall from thenceforth *464] *be and become respectively, exclusively and solely liable to the payment of so much of the said yearly corn-rent or sum as shall be specified in such schedules or descriptions, in exoneration of the other hereditaments thereby charged with the payment of the whole of the said yearly corn-rent or sum, and that such apportioned part thereof shall and may be recovered from the lands or hereditaments so charged therewith, or *from the owners thereof*, in such and the same manner as the whole of the said yearly corn-rents or sums are thereby made recoverable." Under the Tithe Commutation Act, 6 & 7 W. 4, c. 71, the rent-charge in lieu of tithes is charged upon the land in similar terms: but there is an express enactment (in s. 67) that no person whatever shall be personally liable to the payment of the rent-charge: Griffinhoofe *v.* Daubuz, 4 Ellis & B. 230 (E. C. L. R. vol. 82). Here is no such enactment: and there is good reason for the omission; for, it would operate great hardship if the rector were bound to distrain for the whole sum assessed, upon one occupier: and, on the other hand, it would be equally hard upon the rector if he were compelled to resort to a separate distress for each of the small sums assessed upon the various occupiers,—none much exceeding 3*l.*, and some being as low as 1*d.* Then, the payment is to be made to the rector at the rectory house. Who is to make the payment? Clearly not the occupier. [COCKBURN, C. J.—In the case of a distress, it is the goods of the occupier that are taken. CROWDER, J.—In the schedule, the only aggregation or lumping is of lands in each person's occupation, not *ownership.*] The liability to action and distress is in respect of all the lands belonging to the *same proprietor.* [COCKBURN, C. J.—Primarily, the tithe is a charge on *the land.* Your contention is, that the private act throws the burthen upon the *owner* of the land. Now, the two principal clauses,—the 61st and *465] 62d,—*are wholly silent upon that great change: and the whole reliance is placed upon the few words incidentally thrown in at

the end of the 63d section.] The whole scope of the act makes it a charge on the owner or proprietor of the land. [COCKBURN, C. J.—Apart from the words at the end of s. 63, this act does no more than the general tithe act does: and that does not charge the *owner*.] If the occupier were compelled by distress to pay this rent-charge, he would, in the absence of an agreement to the contrary, be entitled to recover it back from the landlord. [COCKBURN, C. J.—What authority is there in the act for that?] It results from the fact of the act of parliament making it a charge upon the land. The rent-charge is to be paid by *the owner*, to the rector, at the rectory-house. There is nothing in the general scope of the act to indicate any intention to impose the charge upon the occupier. It is like any other charge on the land. [COCKBURN, C. J., referred to Cumming *v.* Bedborough, 15 M. & W. 438.†] Assuming that the party charged is the *owner*, the case of Willoughby *v.* Willoughby, 4 Q. B. 687 (E. C. L. R. vol. 45), is a strong authority for the plaintiff. There, by an act (6 & 7 W. 4, c. 16, private) for dividing and allotting commons and wastes in a parish, the rector's tithes, and some detached portions of glebe, were commuted for a rent-charge, on the principle of a corn-rent: and an arbitrator was empowered to declare the amount by award. The rent-charge was to be charged on the lands of W. situate in the parish, in exoneration of the lands of all other proprietors therein: and the act declared that it should be lawful for the arbitrator, by his award, to divide the rent-charge into so many portions as he should think fit, and to charge each portion on a separate part of W.'s lands, in order that each might be subject only to the portion charged thereon. Provision was made for revising the amount of the rent-charge periodically at the *end of seven years, at the instance of the rector or of W., his heirs or assigns, owners for [*466 the time being of the lands to be charged. The act provided, that, so often as the rent-charge should be three months in arrear, the rector, his executors, &c., should have "such and the like powers and remedies for recovering the same, together with all expenses incident to the recovery thereof, as by the common law or statute are given to landlords for the recovery of rent when in arrears." The act gave compensation to W., by allotments of land, for the burthen which his lands would suffer by the rent-charge. It was held that the act did not point out W. as the person by whom the rent-charge was to be paid. A doubt was intimated whether the statute gave a remedy by action against any person; but it was held, that, if any such action lay, it could be only against an occupier of the land charged. In giving judgment, Lord Denman says: "No *person* is mentioned by whom the said rent-charge shall be paid and payable. No remedy is given for the recovery of it until it shall be behind and unpaid by the space of three calendar months; and then the rector 'shall have such and the like powers and remedies for recovering the same,' 'as by the common law or statute are given to landlords for the recovery of rent when in arrear.' No demand is required to be made by the rector or any person prior to his having recourse to such powers and remedies. The rent-charge in this case being perpetual, it is conceded that no action of debt would lie for the recovery of it, according to the case of Webb *v.* Jiggs, 4 M. & Selw. 113, unless it be given by the 85th section of the act in question. It cannot be denied that by law an action of debt for rent will lie by a

landlord against his tenant. If, therefore, this act had stated by *whom* the rent was to be paid, we should have had little difficulty in saying
*467] that an action of debt would lie for it." 2. *The second question is, whether the distress was properly made for the 19*l.* 9*s.* 1*d.* due on the 25th of March, 1856, in respect of the whole of the lands in the parish of which the wardens and society were the owners and proprietors, a portion of which lands they had purchased since the making of the award. The affirmative of that proposition is inconsistent with the argument on the first point. That the rector was entitled to distrain for part, is clear. The distress, therefore, could not be unlawful, though it might be excessive. 3. The distress for the 8*l.* 14*s.* 8*d.* which became due on the 24th of June, in respect of that portion of the lands of which the wardens and society were owners and proprietors at the time of the award, raises substantially the same question as that first argued. The distress clearly was justifiable.

Byles, Serjt. (with whom was *Huddleston*, Q. C.), contrà.—There are three states of circumstances before the court in this case,—1. an action brought by the rector to recover 30*l.* 10*s.* 2*d.* in respect of rent-charge in lieu of tithes for the whole of the lands within the parish of which the defendants in that action, the wardens and society of Sutton Coldfield, were owners and proprietors,—2. a distress for 19*l.* 9*s.* 1*d.* levied by the rector for rent due on the 25th of March, 1856, in respect, not only of lands of which the corporation were owners at the time of the award, but also of lands acquired by them by purchase since that time, the person distrained on not being in possession of the whole of the lands upon which the rent is charged,—3. a distress for 8*l.* 14*s.* 8*d.* for rent-charge arising from lands which were in the ownership of the corporation at the time of the award and at the time of the distress, and taken upon land of an occupier who was in possession of the whole of
*468] the lands out of which the rent-charge claimed *is issuing. 1. The first question is, whether the action will lie. Unless there are words in the act of parliament under which this charge is created which expressly or impliedly render the owner of the land liable, the action is not maintainable. That was distinctly decided in Willoughby *v.* Willoughby, 4 Q. B. 487 (E. C. L. R. vol. 45). The words of the statute upon which that case turned expressly excluded personal liability on the part of any one. No action lay at common law for tithes: the only remedy for them was an action on the statute, 2 & 3 Ed. 6, c. 13, for not setting out tithes. It is only by express enactment that the liability to tithes or rent-charge in lieu of tithes can be removed from the person primarily chargeable, and imposed upon somebody else. The 61st and 62d sections of the private act clearly do not charge the owner or proprietor: it is only by the language found at the end of s. 63, that he is sought to be made responsible,—that, "upon any division of such hereditaments by sale or otherwise (except by lease or demise at rack-rent), the hereditaments so to be sold or divided shall from henceforth be and become respectively exclusively and solely liable to the payment of so much of the said yearly corn-rent or sum as shall be specified in such schedules or description, in exoneration of the other hereditaments hereby charged with the payment of the whole of the said yearly corn-rent or sum, and that such apportioned part thereof shall and may be recovered from the lands or hereditaments so charged therewith, or *from*

the owners thereof, in such and the same manner as the whole of the said yearly corn-rents or sums are hereby made recoverable." Lister *v.* Lobley, 7 Ad. & E. 124 (E. C. L. R. vol. 34), shows that "owner" is a word of flexible meaning. By a turnpike act, the trustees were authorized to enter upon and take certain lands, and to pull down certain houses, buildings, *&c., "making or tendering satisfaction to the [*469
owners or proprietors of all private lands, houses, buildings," &c., so taken, "for any loss or damage they may sustain thereby;" and it was provided that they should not be authorized to take other buildings, &c., without the consent of "the owners or proprietors thereof, or other persons interested therein:" and it was held that compensation was to be made, in the case of premises taken under the former clause, not only to the owners of the fee-simple in the lands and buildings, but also to the lessees of the same for terms of years. Lord Denman there says,—"It appeared to me at the trial, and it does so most clearly now, that the plaintiff was an 'owner or proprietor' for the purpose of receiving satisfaction. The words have no definite meaning. They may refer to owners having either the whole or partial interests. These are, properly speaking, owners in each case. It would be inconvenient and unjust if the trustees were required to make satisfaction to the tenant in fee for any loss or damage which another party might sustain. The person having a partial interest can recover in no character except that of owner or proprietor." And Littledale, J., said: "It seems clear to me that the plaintiff comes within the words 'owners or proprietors.' These are not legal terms; but they must be understood from their ordinary use. I do not see that owner necessarily means the tenant in fee-simple. In common sense, one would ask, whose is the land? who has the beneficial rent? If there be a nominal rent, how can the tenant in fee-simple be the owner? Suppose there were a lease for ninety-nine years, with no rent reserved,—in common sense you would call the lessee the owner. The word 'owners' has, therefore, no definite meaning." [WILLIAMS, J.—If it has any definite meaning here, it must be "the *person entitled to receive the rack-rent."(*a*)] The 1st section [*470
of the act speaks of "owners and proprietors;" in s. 61, the word "proprietors" only is used, and at the end of s. 63 the word "proprietors" is dropped, and the word "owners" alone used. [WILLIAMS, J.—If your argument be well founded, I do not see any reason for the exception made in the case of occupiers at rack-rent. If the occupier is liable, what signifies whether he is an occupier at rack-rent or not? CROWDER, J.—Is the word "owner" in s. 63 to receive a different interpretation from the same word in ss. 61 and 64?] Originally the land only was liable for tithes: there is nothing to make the owner or proprietor liable for the substituted rent-charge, except the introduction of the word "owner" in the concluding part of the 63d section. It never could have been the intention of the act to impose such a liability in that incidental manner. 2. The right to distrain upon an occupier in one district for rent accruing in respect of lands in that and also in another district, has not been insisted upon. 3. The only remaining question, therefore, is the third,—as to the right to distrain upon one tenant for all the rent-charge arising within the particular district. It

(*a*) See the Building Act, 7 & 8 Vict. c. 84, s. 2, and the Metropolis Local Management Act, 18 & 19 Vict. c. 120, s. 250.

is to be observed that the act of parliament gives the tenant distrained on no claim for contribution. It is submitted that the act meant to make each tenement or close bear its own burthen. [COCKBURN, C. J.—If the local act had not passed, and the parish had come under the general act, there would have been no liability cast upon the owner.] The two acts are in pari materiâ, and should receive the same construction. WILLIAMS, J.—Your argument results in this, that there is no *471] difference as to districts whether there is a division by sale *or by leasing?] As to the last point, that is so. Upon the whole, it is submitted that neither the action nor the distresses can be sustained.

Garth was heard in reply. Cur. adv. vult.

There being a difference of opinion in the court as to a part of the case, the judgment of the majority was now delivered by

CROWDER, J.—This case was argued before my Lord Chief Justice, my Brothers Williams and Willes, and myself, in the course of last term: and I regret to say we have been unable to come to an unanimous opinion upon it. My Lord Chief Justice differs from the rest of the court as to a part of the judgment which I am about to deliver. This judgment, therefore, is to be taken as that of my Brothers Williams and Willes and myself.

This was a special case stated for the opinion of the court in two actions of Bedford *v.* The Warden, &c., of Sutton Coldfield, and Silvester *v.* Bedford, Clerk.

The first was an action by the rector of the parish, to recover from the defendants, the owners and proprietors of enclosed lands in his parish, the amount of the rent-charge laid upon the lands in lieu of tithes, under the provisions of the local enclosure act of 5 G. 4, c. 14: and the first question for our opinion is, whether such action can be maintained.

In the preamble of the act, the names of several of the proprietors and owners of enclosed lands within the parish, paying tithes to the rector, are mentioned; and, among them, the names of the defendants. Then, by the 61st, 62d, and 63d sections, the tithes are abolished, and a rent-charge imposed in lieu thereof.

*472] It is contended for the plaintiff, that, according to *the true construction of those sections, an action lies by the rector against the landowners for non-payment of this rent-charge.

It is clear that the language of those sections does not in terms authorize such an action; and, further, that it does not expressly say that the rent-charge shall be paid by the landowners. But it is argued, that, reading the three sections together, and looking at the general scope and purview of the act, the landowners are bound to pay the rent-charge to the rector, and that an action lies to compel payment when it is withheld. The main argument in support of this view is founded on the direction in the 61st section, that the rent-charge should be paid at the times mentioned, "*at the rectory-house;*" and also on that part of the 63d section, which, referring to the case of a subdivision of the original lands, as set out in the schedule, enacts that "the apportioned part of the rent may be recovered from the lands and hereditaments so charged therewith, *or from the owners thereof*, in such and the same manner as the whole of the said yearly corn-rents or sums are hereby made recoverable." And then it is said that the 62d section shows that an action may be brought for the whole, and so by implication that it

may be brought against the owners of the land. But the case of Willoughby *v.* Willoughby, 4 Q. B. 487 (E. C. L. R. vol. 45), cited at the bar, seems to us to conclude this question against the plaintiff. There, although there was a clause in the local act substantially the same as the 62d section in the present act, the court held that no action lay by the rector against the landowner; because no such action was given by the act in express terms, and it did not clearly appear that the landowner was the party bound to pay the rent-charge.

We think the argument founded on the language already referred to, in the 63d section, and the *direction in the 61st section, that the rent-charge shall be paid "at the rectory-house," are not sufficient to distinguish the present case from Willoughby *v.* Willoughby. And it seems clear, that, at the time of the passing of the 5 G. 4, c. 14, no action lay for the recovery of a rent-charge issuing out of freehold lands: Webb *v.* Jiggs, 4 M. & Selw. 113. The direction as to paying the money at the rectory-house raises no legitimate inference in favour of the plaintiff: it only shows, that, unless the money is paid at the rectory-house by somebody, a distress may be put in upon the lands for it. And, although the words relied on by the plaintiff's counsel, in the latter part of the 63d section, refer to some supposed provisions in the act giving an action against the landowners; yet we can find none such either in the 62d section or in any other part of the act. [*473

As to the first action, therefore, we think the judgment of the court ought to be for the defendants.

The second action mentioned in the case was brought by an occupier against the rector, for two several alleged illegal distresses made upon the lands in his occupation. The first was a distress for the amount of the rent-charge imposed upon lands of the Wardens and Society of Sutton Coldfield, of which they were owners when the act passed, as well as the amount imposed upon other lands purchased by them of other owners subsequently. And we think it quite clear that such distress for the joint sum was illegal, and that, consequently, the action against the rector well lies for that distress. Indeed, the rector's counsel, in the course of the argument, gave up this part of the case.

The second distress was made upon the plaintiff, who was the occupier of some of the lands belonging to the same proprietor, for the whole rent-charge imposed on all the lands of such proprietor, comprising lands not in the same occupation, but of which such *proprietor is still the owner. And we are of opinion that this distress was legal, and that no action can be maintained against the rector for making it. [*474

The 61st section first requires the commissioner to ascertain the aggregate value of the tithe of all the enclosed lands in the parish belonging to all the proprietors, and to ascertain the aggregate amount of composition for the whole tithes. It then requires him "to ascertain and determine what yearly sums, according to such aggregate annual amount, are an equivalent to the tithes, &c., of *each proprietor's old enclosed lands* and tenements within the parish; which said yearly sums shall be yearly charged upon the old enclosed lands and tenements of the respective proprietors, as yearly rents payable thereout respectively to the said rector and his successors in lieu of the tithes thereof; and the same rents shall accordingly be, and are hereby, charged on the said

several enclosed lands and tenements of the several proprietors:" "And the several yearly rents or sums to be ascertained and set forth as aforesaid, subject to such variations as is hereinafter provided for, shall be issuing and payable for ever from and out of the several lands and tenements to be charged therewith as aforesaid."

It seems to us, that, upon the true construction of this section, one sum is to constitute the rent-charge upon all the lands of the same proprietor. And as, by the 62d section, the same remedy is given to the rector as a landlord has for his rack-rent in arrear, a distress for the whole sum may be legally made upon any part of the lands out of which the whole sum as a rent-charge issues. And this result still more plainly appears on referring to the provisions of the 63d section, which contemplates the future regulation of the rent-charge, upon the alienation of any part of the lands on which it is imposed. After directing that a *475] schedule *shall be made showing the portion of the rent-charge applicable to each smaller portion of land, it enacts, that, upon "any division of such hereditaments by sale or otherwise (except by lease or demise at rack-rent), the hereditaments so to be sold or divided shall from thenceforth be and become respectively exclusively and solely liable to the payment of so much of the said yearly corn-rent or sum as shall be specified in such schedule, &c., in exoneration of the other hereditaments hereby charged with the payment of the whole of the said yearly corn-rent or sum; and that such apportioned part thereof shall and may be recovered from the lands or hereditaments so charged therewith, or from the owners thereof, in such and the same manner as the whole of the said yearly corn-rents or sums are hereby made recoverable." From which it seems to us clear that it is only in case of a division by sale or otherwise *after the passing of the act* that the sum to be recovered by distress on the part divided is confined to the amount in the schedule apportioned to the part so divided,—leaving the operation of the 61st section in other respects entirely unaffected.

For these reasons, we are of opinion that the second distress was legal, and that no action lies against the rector for it.

COCKBURN, C. J.—I entirely concur with the rest of the court, that, in the first of these actions, there must be judgment for the defendants. I regret that I find myself constrained to differ from my learned Brothers in the view they take of the case of Silvester v. Bedford.

As regards the first of these cases, I entertain no doubt that the action will not lie. The question turns on the effect of the 61st and 62d (and, as it is contended, of the 63d) sections of an act of the 5 G. 4, c. 14, *476] for the enclosure of lands in the parish of Sutton *Coldfield. The 61st section provides for the extinguishment of the tithes, and the substitution of yearly sums to be paid as yearly rents in lieu thereof; which rents are to be charged on the lands; with a further provision that these yearly rents shall be paid to the rector at the rectory-house on the four quarter-days in each year. The 62d section then provides that the rector, in addition to all present powers for recovery of tithes and compositions, shall have the same powers and remedies for recovering these rents or sums of money as by common law or statute are given to landlords for the recovery of rack-rent in arrear.

I am clearly of opinion that no right of action accrues to the tithe-owner against the owners of land for the recovery of the rent-charge

thus created. It is clear that, prior to the act, there was no personal liability in respect to the tithe, beyond the obligation of the occupier to set it out. The 61st section of the present act does away with this obligation, and substitutes for it a rent charged upon the land, without any provision as to any personal liability in the landowner. But the mere creation of a rent-charge, without more, will not impose any personal liability which the grantee can enforce by action. It was contended, indeed, in the course of the argument, that the provision that the rent should be payable at the rectory house distinguished this from the case of an ordinary rent-charge. But there is nothing whatever in this argument. The object of the provision evidently was, to relieve the rector from the necessity of applying upon the various lands for payment. At law, rent is regularly due and payable upon the land from which it issues, if no particular place is mentioned in the reservation: Co. Litt. 201 b. But for this provision, the rector must have gone upon the land to receive the rent: the effect of it is, to relieve him from that necessity, before he *proceeds to enforce his right against [*477
the land. The 62d section carries the case no further. It provides the remedies for enforcing payment of the rent-charge. But it is obvious that the remedies given, however extensive and efficient they may be, can, so far as a personal liability is sought to be enforced, be directed only against those in whom a personal liability exists; unless, indeed, a right of action were given against the landowner in such express terms as to create a personal liability. Such, however, is not the case here. The object of the clause was, to give a power of distraining for the rent-charge; it being perhaps doubtful how far the 4 G. 2, c. 28, s. 5, would apply to a rent-seck, such as, independently of statutory provisions for distress, such a rent as this would be. In doing this, large and general words have been used, but not such as will suffice to create by implication the personal liability in the landowner which it is now sought to enforce. Had it been intended to create a new liability of this kind, I cannot but think that the legislature would have had recourse to express enactment, instead of leaving a matter of so much importance to mere implication. At all events, the case of Willoughby v. Willoughby is a direct authority for saying that no such liability will be created by such an enactment as the present, unless the party by whom the rent is to be paid is expressly pointed out by the act.

The 63d section is, however, further relied on as showing the liability of the landowner. That section, having provided for the apportionment of the rent-charge in case of the division of the land, concludes by saying that the apportioned part shall be recoverable from the lands charged therewith, or *from the owners* thereof, in such and the same manner as the whole of the said yearly corn-rents or sums are made recoverable by the act. But I am of opinion, that, if the *effect of the preceding [*478
sections was not to render the owner personally liable, these words, thus incidentally introduced at the close of a section passed for a different purpose, will not have that operation. Even if this language should lead to the inference that those who framed or passed the 63d section conceived that they had imposed such a liability by the preceding sections, such a belief will not supply the place of the necessary provisions for that purpose. But the probability is, that these words have been inserted or retained per incuriam.

I quite concur, therefore, in saying that in this case there must be judgment for the defendants.

In the other case, of Silvester *v.* Bedford, I am of opinion that the plaintiff is entitled to recover in respect of both distresses.

The question turns upon whether, the corporation of Sutton Coldfield being the owners of numerous properties in the parish, the aggregate of the rent-charge due in respect of all can be levied upon any one. I cannot bring myself to think that this can be so. It is clear, that, before the passing of the act, the tithe was due in respect of each of the lands and tenements immediately; and the declared purpose of this part of the act, as stated in the preamble to the 61st section, was, that the tithes arising out of any lands, tenements, or hereditaments should cease and be extinguished, and that, "*in lieu thereof*, yearly rents or sums of money should be ascertained and paid to the rector." Accordingly, the commissioner is to fix and ascertain the total aggregate annual amount which will be a just, fair, and equal compensation to the rector; and, having done so, he is "to ascertain, with reference to such aggregate amount, what yearly sums are equivalent to the tithes of each proprietor's lands and tenements," and such yearly sums are to be
*479] "charged upon the lands and *tenements of the respective proprietors, as yearly rents payable thereout respectively:" and then "the same rents are charged on the several lands and tenements of the several proprietors."

I cannot believe that the legislature here intended to do more than to substitute a rent-charge for tithe, in respect of each tenement previously liable to tithe. I cannot suppose that, where estates, although belonging to the same proprietor, were different in point of locality and occupation,—such as farms or houses occupied by different tenants,—it was intended to fix the whole with one aggregate charge. Great inconvenience, as it seems to me, would be liable to arise from such an arrangement. Although, as a charge upon the land, the tithe rent-charge falls, as the tithe itself did, ultimately on the owner, yet in general practice the rent-charge is, I believe, paid by the occupier: at all events, he it is who is immediately liable to be distrained on for the payment. I cannot think that the legislature intended to expose the occupier of farm A. to this serious inconvenience, because the occupier of farm B., or even the common owner of both, shall have failed to discharge the liability in respect of B. At least, I should expect such a provision to be expressed in clear and definite language; whereas the language of the 61st section not only, as it seems to me, admits of, but rather leads to, an opposite construction, inasmuch as it speaks of the rents "charged on the *several* lands of the *several* proprietors."

The 63d section does not appear to me to carry the matter further. With a view to the possible division, by sale or otherwise, of the hereditaments which shall have been charged with the substituted rent, the commissioner is directed to make "schedules or descriptions of the several hereditaments chargeable with the said yearly rent or sum, and the
*480] particular measure thereof *in acres, roods, and perches, and to declare what proportion thereof shall be charged upon each and every part of *such* respective hereditaments:" and the section then goes on to provide, that, "in case of any division of such hereditaments by sale or otherwise (except by lease or demise at rack-rent), the here-

ditaments so to be sold or divided shall become, respectively, exclusively, and solely liable to the payment of so much of the said rent or sum as shall be specified in such schedule, in exoneration of the other hereditaments hereby charged with the payment of the whole."

It appears to me that there is nothing in this inconsistent with the construction which I think should be put on the 61st section. It is obvious that the provision and language of the 63d section will apply to the case of a single property or tenement, as well as to that of several. It is impossible to suppose that the provision was not intended to apply to the case of a man who, having a single property, sold a portion of it, and was only intended to reach the case of a man who, having several distinct tenements, sold one of them: and I cannot but think that the purpose of this section was to have the several closes or parcels of which each property consisted, severally assessed, in order to provide for the event of the property becoming afterwards divided.

Be this, however, as it may, it seems that the commissioner has taken the view I have here suggested, and has assessed the properties of each owner, not in the aggregate, but severally: for, though each owner's properties are assessed consecutively with such proprietor's name set forth once only in the first column, yet each property is assessed separately under the name of its particular occupier: and, the several closes and parcels of which the tenement is composed being separately assessed, the aggregate amount of the assessment *of the whole tenement [*481
is ascertained and fixed: but nowhere is there any aggregation or attempt at aggregation of the sum total of the various amounts of the different tenements.

It is said that this may now be done, and so the sum total be ascertained to which the aggregate of the numerous farms, houses, and other tenements owned by the corporation of Sutton Coldfield in this parish, may be liable. But I do not think that we are at liberty thus to meddle with and alter the apportionment made by the commissioner. As it stands, it is an assessment of each tenement according to its occupation; and the plaintiff, Silvester, was, therefore, in my opinion, only liable to be distrained upon for the amount set against the land in his own occupation. I think, therefore, he is entitled to recover in respect of both the distresses made upon his premises.

Judgment for the defendants in the first action.

Judgment for the plaintiff in the second action, in respect of the first distress.

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*ROBERTS *v.* EBERHARDT. *Dec.* 8. [*482

A plea of nul tiel agard, to an action upon an award, puts in issue not merely the fact of the making of the award set out in the declaration, but the making of a good and valid award of and concerning the premises referred.

A. and B., who had carried on business as coal and lime masters, agreed to dissolve their partnership upon certain terms. B. having died, leaving his wife his executrix, it was agreed between A. and the executrix that the agreement for dissolution should be carried out, and that the settlement of all disputes thereon should be referred to an arbitrator. A. and B. had also carried on business in partnership as attorneys; and, by another agreement, reciting that disputes had arisen between A. and the executrix about the last-mentioned partnership and the accounts thereof, all matters in dispute relating thereto were referred to the same

arbitrator; and it was agreed that the arbitrator so appointed should be receiver of the estate and effects of the law partnership, and should settle and get in as he thought fit all costs due to the estate, and "dispose of the estate, moneys, and effects of the said law partnership in such manner as he should think best for the interest of A. and the executrix," and that "the costs and expenses of the reference and award should be in his discretion."

By his award, the arbitrator, amongst other things, stated that he had "received the estate, moneys, and effects belonging to the estate of the said law partnership, and in the said second agreement mentioned to be then remaining unrealized," and had "got in and settled, on such terms as he thought fit, all bills of costs due to the estate of the said law partnership, and had *disposed of the estate, moneys, and effects of the said law partnership in such manner as he had thought best for the interests of A. and the executrix;*" and he awarded that the sum of 1069*l.* 13*s.* 8*d.* was due from the executrix to A., and ordered her to pay the same to him within one week: he then awarded mutual releases, and he concluded thus,—"I *certify* that I have deducted and retained to myself the costs [not saying how much] of this my award out of the moneys which have been received by me as such receiver as aforesaid:"—

Held, by Cockburn, C. J., Cresswell, J., and Willes, J., that the award was void, both because it did not show how the costs of the award were to be paid, and so was not final, and because the arbitrator had retained, from a fund belonging to the parties which was in his possession as receiver for them, the amount of his costs before he signed and delivered his award.

Held, by Williams, J., that the award was good, notwithstanding these objections,—the arbitrator having authority as receiver to dispose of the moneys he received as he should think best for the interest of the parties, and having exercised his discretion in disposing of some of those moneys in defraying the costs of the award, and therefore not having neglected his duty as arbitrator in omitting to adjudicate as to the costs of the award.

The judgment of the majority was reversed by the Exchequer Chamber, on appeal,—the majority of that court being of opinion that the award was not void for the reasons assigned.

An arbitrator cannot, unless such power is expressly reserved to him by the submission, award to himself a sum (named or otherwise) for his own costs and expenses.

THIS was an action upon an award.

The declaration stated, that, by an agreement, dated the 25th of July, 1854, made between the plaintiff of the one part, and the defendant of the other part,—after therein reciting that the plaintiff and one Henry Eberhardt then lately carried on the trades of coal-masters and lime-masters at Tipton Green, Buckpool, and Hayhead, in the county of Stafford, as copartners, under the firm of Roberts & Eberhardt, and that the properties and effects of the said copartnership belonged to the said copartners is equal proportions; and

*483] *reciting that the said Henry Eberhardt duly made his will, dated the 16th of December, 1853, and thereby gave and devised to his wife, the defendant, all his real and personal estate, and appointed her executrix thereof, and that the said Henry Eberhardt died on the 16th of April then last, without having revoked or altered his said will, which was duly proved by the defendant in the Prerogative Court of Canterbury on the 17th of May, 1854; and further reciting, that, previously to the death of the said Henry Eberhardt, a proposal in writing, dated the 3d of February then last, had been made by the plaintiff to the said Henry Eberhardt, to buy the share, estate, and interest of him the said Henry Eberhardt of and in the said colliery, mines, credits, hereditaments, and premises at Tipton Green aforesaid, belonging to the said copartners, for the sum of 20,000*l.*, to be paid in manner in the said proposal mentioned; and, among other things contained in the said proposal, it was proposed that the said copartnership in respect of the said Tipton Green works should be considered to have been dissolved on the 31st of December then last; and that the said proposal was signed by the plaintiff, and verbally accepted and agreed to by the said Henry Eberhardt, subject to certain marginal observations which were approved of by the plaintiff, but that it was never signed by the said Henry Eber-

hardt; and also reciting that the plaintiff also made a verbal offer to buy the entirety of the hereditaments, properties, credits, and effects belonging to the said copartners in respect of their said trades carried on at Buckpool and Hayhead aforesaid, for the sum of 3500*l.*, and that the said copartnership in respect of the last-mentioned trades should be considered as dissolved from the 25th of March, 1853, and that such last-mentioned verbal offer was verbally accepted by the said Henry Eberhardt; and after reciting that the *defendant, at the request of the plaintiff, had since the death of the said Henry Eberhardt [*484 agreed to accept and carry out the said written and verbal proposals so made and accepted by the said Henry Eberhardt in his lifetime, and, for the purpose of testifying such her acceptance of, and making other arrangements connected with, the execution of the said proposals, she the defendant had consented to sign the agreement thereinafter contained,—It was witnessed that the plaintiff and defendant did thereby mutually agree to carry out the said above-mentioned written and verbal proposals, subject as aforesaid, and that proper deeds of dissolution of partnership containing all necessary provisions, and mutual releases, and all other conveyances, releases, mortgages, and deeds necessary for carrying out and completing the said proposals should be drawn by one John Harward as between the said parties, and his settlement thereof should be binding on both the said parties: And it was thereby further agreed between the said parties, that, inasmuch as the said John Harward was fully acquainted with the negotiations connected with the said proposals, and with the intentions of the parties thereto, all disputes or differences between the said parties (if any) in reference to the said proposals, or either of them, or to the construction, meaning, or effect of any clause therein, or to the arrangements, acts, or deeds connected with the carrying of the same into completion, and all claims and demands whatsoever of the said parties thereto against each other in respect of the said copartnership, or any of them, or of the said proposals, or of that agreement, should from time to time as the same might arise be referred to the arbitration and award of the said John Harward, and should not be made the subject of litigation, except in default of such arbitration and award within a reasonable time after the submission of the *said [*485 disputes and claims as aforesaid, and that such arbitration and award should be final and conclusive between the parties, and that the said submission to arbitration might at the request of either of the said parties be made a rule of either of Her Majesty's courts of law or equity at Westminster: That, by a certain other agreement, dated the 25th of February, 1856, and made between the plaintiff of the one part, and the defendant of the other part,—after reciting, amongst other things, that the plaintiff and the said Henry Eberhardt had then lately carried on the business or profession of attorneys and solicitors at Stourbridge, as partners, under the firm of Roberts & Eberhardt, and the estate, moneys, and effects of the said partnership, and the profits of the said business or profession, belonged to the said partners in the proportions following, that is to say, five equal eighth parts thereof belonged to the plaintiff, and the remaining three equal eighth parts thereof belonged to the said Henry Eberhardt; and that the said partnership was dissolved shortly before the death of the said Henry Eberhardt, but the partnership estate, moneys, and effects had not at the said date of that agreement been

realized, nor the partnership accounts settled, nor any deed of dissolution and mutual release executed; that the plaintiff and the said Henry Eberhardt also carried on the trades of coal-masters and lime-masters in partnership, and that, since the death of the said Henry Eberhardt, the said John Harward had been appointed arbitrator between the plaintiff and the defendant in respect to certain disputes and differences which had arisen between them in respect of the said last-mentioned trade partnerships; and reciting that disputes and differences had arisen between the plaintiff and defendant in respect of the said law partnership between the plaintiff and the said Henry Eberhardt, and it had been *486] agreed between the parties that such *disputes and differences should be referred to the said John Harward in manner thereinafter contained and hereinafter mentioned, the plaintiff and the defendant severally agreed with each other as follows,—That all disputes and differences between them which had already arisen or might thereafter arise before the signing of the final award thereinafter referred to and hereinafter mentioned, in reference to the said law partnership, whether relating to the realization of the said partnership estate, moneys, and effects, or to the settling of the partnership accounts as between the partners or their representatives with each other, or as between the then late law partnership firm with the clients, or to the form of the deed of dissolution and mutual release to be executed by the said parties, or otherwise, and also all other disputes and differences between the said parties not included in the reference to arbitration thereinbefore mentioned as aforesaid, which had arisen or might thereafter arise before the signing of the said final award, in reference to or out of the said law and trade partnerships, should be referred to the arbitration and award of the said John Harward, so as the said award were made under his hand on or before the 24th of June then next: That the said John Harward should be the receiver of the estate, moneys, and effects belonging to the estate of the said law partnership, and which then remained unrealized, and *should have power to* get in and settle on such terms as he should think fit all bills of costs due to the estate of the said law partnership, and *dispose of the estate, moneys, and effects of the said law partnership in such manner as he should think best for the interest of the plaintiff and the defendant:* That the said John Harward should have power to investigate and settle all accounts between the plaintiff and the defendant in respect to the said law partnership or otherwise, and to draw and settle all *487] *such deeds of dissolution and mutual releases and other deeds which he might think fit in reference to the matters aforesaid, or any of them: That he should be at liberty to make professional charges for business done in connection with the reference thereby made, or with the reference thereinbefore mentioned as aforesaid: *That the costs and expenses attending the reference thereby made, and the said reference thereinbefore mentioned, and the award or awards to be made under such several references, should be in his discretion:* That the reference thereby made and the said reference thereinbefore mentioned might be regarded as one single reference, and that it should be lawful for the said John Harward to make one single award embracing matters comprised in both references, or *several and distinct awards*, respecting the several references, *or to state and separately adjudicate upon any particular claim, dispute, or difference*, claims, disputes, or differences, made

by or on behalf of or arising between the plaintiff and the defendant, and to make an award or order in the nature of an award as respected such particular claim, dispute, or difference, which award or order should be binding on the said parties thereto, notwithstanding that the same might not be a final award comprising all the subject-matters of difference: And that any award to be made by the said John Harward in the matters aforesaid, or any of them, should be final and conclusive between the parties: Averment, that the said John Harward,—having taken upon himself the burthen of the said arbitrations, and having heard and duly considered all the allegations and evidence of and concerning all the matters referred as aforesaid; and having drawn and settled all such deeds of dissolution and mutual releases and other deeds as he thought fit in reference to the matters in the said agreements or either of them mentioned; and having *examined and investigated all the disputes and differences, claims, and demands submitted [*488 to him by the said agreements respectively; and having investigated and settled all accounts which according to the said agreements or either of them were to be investigated and settled by him; and having received the estate, moneys, and effects belonging to the estate of the said law partnership and in the said secondly mentioned agreement mentioned to be then remaining unrealized; and having got in and settled on such terms as he thought fit all bills of costs due to the estate of the said law partnership; and having disposed of the estate, moneys, and effects of the said law partnership in such manner as he had thought best for the interests of the plaintiff and the defendant; and all things having been done necessary to enable and entitle him to make such award as thereinafter mentioned,—did, within the time so limited for the making of such award, to wit, on the 23d of June, 1856, duly make and publish his award in writing under his hand, *of and concerning the said matters referred to him*, and did thereby (amongst other things) award and determine that the sum of 1069*l.* 13*s.* 8*d.* was then due from the defendant to the plaintiff, and did thereby order the defendant to pay the same to the plaintiff within one week from the date of the said award: And that the defendant did not pay to the plaintiff the said sum of 1069*l.* 13*s.* 8*d.* within the said period so appointed for payment thereof as aforesaid, and which had elapsed before this suit, and the same still remained and was wholly unpaid.

There was also a count for money paid and for money found due upon accounts stated.

Pleas,—first, that it was not agreed as in the declaration in that behalf firstly alleged,—secondly, that it was not agreed as in the declaration in that behalf secondly alleged,—thirdly, that the said John Harward *did not make any such award of and concerning the [*489 matters referred to him as in the declaration in that behalf alleged. Issue thereon.

At the trial before Crowder, J., at the second sitting in London in Hilary Term last, the plaintiff proved the due execution of the two agreements and of the award. The award, which bore date the 23d of June, 1856, after reciting the agreements, proceeded as follows:—

"Now know ye that I the said John Harward, having taken upon myself the burthen of the said arbitration, and having heard and duly considered all the allegations and evidence of and concerning all the

matters referred as aforesaid, do make and publish this my award in writing *of and concerning the said matters.* I have drawn and settled conveyances by the said Mary Eberhardt to the said Charles Roberts of her shares, estates, and interests in the said collieries, mines, credits, hereditaments, and premises at Tipton Green aforesaid, and in the hereditaments, properties, credits, and effects, belonging to the said copartners in respect of the trades carried on at Buckpool and Hayhead aforesaid, certain parts of the said hereditaments, properties, credits, and effects being comprised in the deed of dissolution and mutual release hereinafter mentioned; and I have also drawn and settled a mortgage from the said Charles Roberts to the said Mary Eberhardt for securing the unpaid instalments of the said purchase-money of 20,000*l.*; and such conveyances and mortgage, except the conveyance intended to be effected by the said deed of dissolution and mutual release, have been duly executed. The said conveyances bear date respectively on or about the 29th of November, 1854, the 3d of February, 1855, and the 3d of February, 1855, and the said mortgage bears date on or about the 30th of November, 1854. Such conveyances and mortgage, with the said *490] deed of dissolution and mutual *release afterwards mentioned, are the only necessary deeds for carrying out the said proposals as to such respective premises, or otherwise necessary in reference to the matters mentioned in the said agreements respectively. I have drawn and settled a deed of dissolution and mutual release comprising both the deeds of dissolution and mutual release provided for by the said agreements respectively, such deed containing an assignment to the said Charles Roberts of the personal estate which should be assigned to him in pursuance of the said proposals, and also a conveyance and assignment to the said Charles Roberts of such parts of the said hereditaments, properties, credits, and effects belonging to the said copartners in respect of the said trades carried on at Buckpool and Hayhead aforesaid as were not comprised in the several hereinbefore-mentioned conveyances which have been executed by the said parties. Two copies of the said deed of dissolution and mutual releases have been engrossed; and I have signed a memorandum endorsed on each of the engrossments, stating the same to be the deed of dissolution and mutual release mentioned in this my award; and both such engrossments are now in my possession ready for execution as afterwards mentioned. I have examined and investigated all the disputes and differences, claims and demands referred to me by the said agreements respectively, and I have investigated and settled all accounts which I have been directed to investigate and settle. *I have received the estate, moneys, and effects belonging to the estate of the said law partnership, and in the said second agreement mentioned to be then remaining unrealized;* and *I have got in and settled, on such terms as I thought fit, all bills of costs due to the estate of the said law partnership, and have disposed of the estate, moneys, and effects of the said law partnership in such manner as I have thought best for the interests of* *491] *the said Charles Roberts and Mary Eberhardt.* I award *and determine that the sum of 1069*l.* 13*s.* 8*d.* is now due from the said Mary Eberhardt to the said Charles Roberts, and I order the said Mary Eberhardt to pay the same to the said Charles Roberts within one week from the date hereof. I award and determine that the said Charles Roberts do forthwith execute one engrossment of the said deed

of dissolution and mutual release, and do thereupon deliver the same to the said Mary Eberhardt. And I award and determine that the said Mary Eberhardt do forthwith execute the other engrossment of the said deed of dissolution and mutual release, and do thereupon deliver the same to the said Charles Roberts. I find that there is due from the said law partnership the several sums of money mentioned in the schedule hereto in respect of the transactions of the said law partnership, which sums amount together to the sum of 3156*l.* 19*s.* 5*d.*;(*a*) and I award and determine, that, as between the said Charles Roberts and Mary Eberhardt, the said sum of 3156*l.* 19*s.* 5*d.* is due from the said Charles Roberts and Mary Eberhardt in the proportions following, that is to say, five equal eighth parts thereof from the said Charles Roberts, and three equal eighth parts thereof from the said Mary *Eberhardt. [*492
And I award and determine that the said Charles Roberts, as the surviving partner, do forthwith pay the said sums mentioned in the said schedule, together with such interest thereon as such sums or any of them may bear; and that the said Mary Eberhardt do pay to the said Charles Roberts three equal eighth parts of the sums so paid by him for principal or interest as last aforesaid. *I certify that I have deducted and retained to myself the costs of this my award out of the moneys which have been received by me as such receiver as aforesaid.* I award and determine that each of the parties to the above reference shall bear and pay his and her own costs of the said reference respectively."

A verdict was taken for the plaintiff for the amount claimed, subject to leave to the defendant to move to enter a nonsuit on the ground that the award was bad for defects apparent on the face of it.

Fortescue, in the course of the term, obtained a rule nisi, on the grounds, "that the arbitrator has awarded and retained to himself a portion of the moneys of which he was receiver, for the costs of his award; and also for not having made any award as to the sums received by him, but merely stated that he had laid them out for the benefit of both parties; and for stating merely that he has paid debts with moneys received, not saying what debts, or making any award in respect of the moneys so paid." He referred to the case of In re Coombs, 4 Exch. 839.†

Hugh Hill, Q. C., and *M'Mahon*, in Trinity Term last, showed cause.—It is objected that this award is faulty in three respects,—that it is uncertain in two particulars, viz. as to the sums which the arbitrator has laid out, and as to the debts which he says he has paid,—*and that the arbitrator has improperly retained a sum for his own costs, [*493

(*a*) The schedule referred to was as follows:—

	£	*s.*	*d.*
"Stourbridge and Kidderminster Banking Company	1050	10	11
Miss Roberts	1574	0	4
Mr. Frost	135	8	1
Messrs. Toller & Son	247	12	10
Mr. Davis	67	7	4
Mr. Scott	2	1	0
Worcester Journal	1	2	11
Aris's Gazette	1	0	0
Messrs. Fowler & Son	74	19	0
Messrs. Oaks & Perrens	3	2	0
	£3156	19	5

not saying how much. The power which Mr. Harward had under the two agreements was not that of mere arbitrator: he was also receiver, with power to collect and dispose of the moneys which might come to his hands in that character, in any manner he might think best for the interests of the parties. The objections as to the uncertainty of the award are disposed of by the case of Perry *v.* Mitchell, 12 M. & W. 792,† where this broad principle is laid down, that, under a general reference of all matters in difference, an award which professes to be made de præmissis, and to dispose generally of all the matters referred, is sufficiently certain and final, in the absence of anything to show that there were matters in difference before the arbitrator which are left undisposed of. Then, it is said that the arbitrator has been guilty of misconduct in awarding and retaining to himself a portion of the moneys of which he was receiver, for the costs of his award. The objection, in truth, answers itself; for, the fact of Harward's being receiver distinguishes this from the case cited, of In re Coombs, 4 Exch. 839.† [WILLIAMS, J.—Does the submission contain any provision for the retainer by the arbitrator of the expenses of the award?] Not expressly; but it empowers the arbitrator "to make professional charges for business done in connection with the reference." The payment of the expenses of the award was part of the duty devolving upon him as receiver. [COCKBURN, C. J.—He might intend the costs to be paid out of the common fund. But here he not only settles the fund out of which they are to be paid, but he pays himself. In the case of In re Coombs, it was urged in argument, that, by the terms of the submission, all the costs were to be in the arbitrator's discretion: but Parke, B., said,—"The *494] amount of his own fee is to be excluded, by *natural justice; for, it is contrary to reason that an arbitrator or umpire should be sole and uncontrolled judge in his own cause." It certainly strikes one as quite contrary to reason that the arbitrator should not only settle the amount, but at once put his hands upon it.] Had he done otherwise, he would have left a part of the estate undisposed of. The course he has adopted was rendered necessary by the form of the submission. If he has retained an unreasonable sum, that matter will be dealt with when his accounts as receiver are passed. Further, upon these pleadings, it was not competent to the defendant to impeach the validity of the award. Upon a plea of nul tiel agard, all that the plaintiff was bound to do, was, to prove the making of an award such as that set out in the declaration. If the defendant meant to rely upon defects in other parts of the award not set out, he should have alleged in his plea so much as would show the award bad, and demurred. [WILLIAMS, J.—Something of the sort is said in Fisher *v.* Pimbley, 11 East 188; but it is clearly a mistake; it could not be done.] It is laid down in the notes to Veale *v.* Warner, 1 Wms. Saund. 227 a, that it is not necessary "for the plaintiff to prove anything else on the issue of nul tiel agard, but execution of the award within the time limited to the arbitrators to make their award; and the defendant on such proof may take advantage of some material variance between the award so produced in evidence and that which is set forth in the replication, *but cannot go into objections to the award in point of law:*" Foreland *v.* Marygold, 1 Salk. 72. Upon that is appended a further note referring to p. 103, note (1), "in which it is laid down that upon this issue of nul tiel agard, the defendant may show that the

award is void in point of law: but the better opinion seems to be, as here stated, that he cannot. If the replication [to a plea of nul tiel agard *pleaded to debt on bond] set out the whole award, and it be void in law, the defendant should demur: if it set out only a part, [*495 omitting that which makes the award void, the defendant should set out the whole in his rejoinder, and demur." [WILLIAMS, J.—That clearly is a mistake: it should be, the plaintiff should demur to the rejoinder.] In Viner's Abridgment, *Arbitrement* (D. a), pl. 14, is the following case, from Br. *Pleadings*, pl. 88,—"Debt upon an obligation to stand to the arbitrement, &c. The defendant said that the arbitrators did not make any award, and the plaintiff prist that they did, and so to issue, and this is jeofail; for, the plaintiff shall show certainly what award and where, and that the defendant in such point did not perform it; and the defendant shall say that they made no such award, and the plaintiff shall say then prist that they did, and the defendant shall then say prist that they did not." The same principle is laid down in Farrer *v.* Gate, Palmer, 511, and Skinner *v.* Andrews, 1 Lev. 245. [COCKBURN, C. J.—What do you suggest the defendant should have pleaded here, in order to raise the question he seeks to raise?] He should have set out the rest of the award, and taken the opinion of the court upon its validity. Here, it is left as a fact to the jury. The very point is put by Buller, J., in Praed *v.* The Duchess of Cumberland, 4 T. R. 585, where there was a plea of no such memorial as the statute requires, to an action of debt on an annuity bond. "We are not," says that learned judge, "to require under the allegation of 'no such memorial,' every thing that is required by the act of parliament; it is merely an issue in fact. So, in the case of an award, *if there be an award in fact, the party cannot, on the trial of an issue of no award, go into objections to the award in point of law.* It has, however, been said that the plaintiff might have replied that there was *no such memorial*, &c., in *order to have let in the objections [*496 which arise under the act of parliament; but that word cannot make any difference; it is still but an issue in fact; for, otherwise, it would be sending down an issue in law to be tried by a jury: and it might be as well contended, that, on the trial of an issue 'nul tiel record,' the parties might at Nisi Prius show errors on the record." [CRESSWELL, J.—Why is it necessary for the plaintiff, upon a plea of *no* award, to set out the award in his replication? If *any* award would satisfy the issue, why set it out in the replication? I want to get at the distinction between "no award" and "no *such* award." It may be, that, if issue were taken on *no award*, supposing a *bad* award to be equivalent to *none*, it would be putting matter of law to the jury: and it may be necessary to set out the award, in order to make the matter of law apparent to the court.] In Fisher *v.* Pimbly, 11 East 188, Bayley, J., says: "A submission of matters in difference between A. and B. does not include matters in difference between A. and B. and others jointly: the award, therefore, was bad. Then, a plea of no award means no award according to the submission: that is the plain meaning of it. I do not agree with the argument that the defendant might have defended himself by taking issue upon the award as stated in the replication; for, there *was* such an award as is there stated; but it was not an award made conformably to the submission, which would have appeared to be the case if the whole had been truly set out in the replication. Then, the rejoinder first setting out the

true award, and then demurring to it, is no more in effect than saying that there was no award conformable to the submission, and therefore no award; which maintains the plea." And that is adopted by Alderson, B., in Gisborne *v.* Hart, 5 M. & W. 50.† [WILLIAMS, J.—If there is no good award, there is no award at all,—just as that which is ordinarily *497] *called a bad shilling is not a shilling. Cases of debt on bond for the due performance of an award have no application; they are anomalous.] The goodness or badness of an award cannot be referred to a jury, as in the case of a bad shilling. [CRESSWELL, J.—The goodness or badness of the award is not in terms put in issue, but whether it is an award at all. If nul agard means no valid award, nul tiel agard must mean no valid award in that form.] Fisher *v.* Pimbley was the first case where no award was held to mean no *valid* award. In House *v.* Launder, 1 Lev. 85, in "debt on obligation to stand to an award, the defendant pleads no award; the plaintiff replies, and shows an award and a breach; the defendant rejoins, that a new cause of action arose after the submission, and before the award, and they (the arbitrators) awarded mutual releases to be made at the time of the award made, and nothing further is awarded on one side but the release, and so the award was void; on which the plaintiff demurred, and it was adjudged for him, for, the rejoinder is a departure; for, when he pleads no award, it shall be intended no award at all; and then to show and confess an award in fact, but (saying) that it is void in law, is a departure; and they cited Rugles *v.* Wetherly, Trin. 15 Car. 2, B. R. Rot. 604, as so adjudged, and the like between Dean and Isham, the following term, adjudged." So, in Morgan *v.* Man, 1 Lev. 127, to "debt on an obligation conditioned to perform an award, the defendant pleads no award; the plaintiff replies, and shows an award, and assigns a breach; the defendant rejoins, and shows another matter in controversy, of which the arbitrators had notice, but made no award thereof; and so the award was void, the submission being with an ita quod. But, by the whole court: The rejoinder is a departure, for, no award is none at all, and is not to be maintained by showing *498] the award to *be void: but he ought at first to have pleaded the award, and also that other matter whereby it was void." Harding *v.* Holmes, 1 Wils. 122, and Meriell *v.* Ecclesfield, 2 Keble 156, are to the same effect. [COCKBURN, C. J.—Suppose the plaintiff, in declaring upon the award, sets it out, but omits something which would show it to be bad, what is the defendant's proper course?] To set out the rest of the award. [COCKBURN, C. J.—Why not rest upon his denial of the existence of an award, and, on production of the award at the trial, rely upon the variance?] The plaintiff, in declaring upon an award, is only bound to set out so much thereof as he relies on to support his claim: Perry *v.* Nicholson, 1 Burr. 278. [WILLIAMS, J.—It is difficult to distinguish this case from Dresser *v.* Stansfield, 14 M. & W. 822.† It was there held, that a plea of "no award" means no *valid* award; and therefore a special plea to debt on an award, which showed that the arbitrator had not awarded on all the issues in the cause referred to him, was held bad on special demurrer, as being an argumentative denial of its being a valid award. Parke, B., says: "The award is alleged to have been made of and concerning the premises referred, that is, the cause, which means the issues in the cause. It being alleged that there were no matters in difference between the parties except those in the cause,

then, in order to make the award good and valid, it must be made on all the matters in difference, that is, on all the issues in the cause. Therefore, a plea that there was no award, that is, no valid award, sufficiently raises this objection. To make this plea good, it ought, at all events, to have concluded with a traverse, and so, that there was no award of and concerning the premises. The case is substantially decided by Gisborne *v.* Hart."] In Adcock *v.* Wood, 6 Exch. 814,† a declaration upon an award, after stating that differences had arisen *between the plaintiff on the one part, and the defendant and one S. A. on the other, alleged that it was agreed between the [*499 plaintiff and the defendant and S. A. mutually and reciprocally to refer the same differences to T. S. and W. J., who made their award concerning the said matters in difference, and awarded that the defendant should pay 150*l.* 18*s.* 6*d.* to T. S., who should immediately pay it to the plaintiff. The defendant pleaded that T. S. and W. J. did not make their award concerning the matters in difference referred to them: and it was held that the fact of the award having been made of and concerning the matters in difference, and not its validity, was alone put in issue. And this was affirmed by the Exchequer Chamber,—Wood *v.* Adcock, 7 Exch. 468.† Parke, B., in the court below, says: "We think that the plea in this case merely puts in issue the fact of an award 'of and concerning the matters in difference in the manner and form alleged,' and not the validity of that award on the face of it, and that the latter is matter of law on the record. The authorities cited on the argument(*a*) do not show the contrary. Where there is a plea of 'no award,' not by way of answer to a declaration upon an award, but by way of answer to an action on a bond with a condition to abide by an award, the plea means that there is no good award; and, if the replication sets out the award in part, it is no departure to rejoin that there was an award, setting it out fully, and thereby showing the award to be bad on the face of it. That is the case of Fisher *v.* Pimbley. In that case, Bayley, J., said the defendant could not have taken issue on the allegation of the award in the replication, because there was such an award as there stated. Where the plea of nul tiel agard is pleaded to an action on the award, averring *the award to be made of and concerning the premises, [*500 it puts in issue the fact of the award being made of and concerning the premises, that is, on all the matters submitted: Dresser *v.* Stansfield: but, if the award as set out is on the face of it bad, it does not raise that question to be decided by a jury. The objections on the face of the award are for the court, on demurrer, or in arrest of judgment." The only distinction between that case and the present, is, that there the award as set out was bad. [WILLIAMS, J.—The court there recognise Dresser *v.* Stansfield. If the plea had stated that the award did not dispose of all the matters referred, it would, under the old system, have been bad, as an argumentative plea of nul tiel agard.] The real ground of the decision in Dresser *v.* Stansfield was, that the plea was improperly concluded. Perry *v.* Mitchell, 12 M. & W. 792,† shows, that, if there is anything that is not disposed of by the award, that must be shown by plea. The second objection stated in the rule does not vitiate the whole award. The arbitrator will have to show how he has dealt with the moneys received, when he comes to account as receiver. [COCKBURN, C.

(*a*) Fisher *v.* Pimbley, Gisborne *v.* Hart, and Dresser *v.* Stansfield.

J.—The question for us is, whether the arbitrator has acted in conformity with the submission or not.] If the arbitrator has acted ultrà the powers conferred upon him by the submission, the party complaining might have moved to set aside the award. The third objection is perfectly groundless. [This was conceded.]

Fortescue, in support of his rule.—Whatever doubts formerly existed as to the proper mode of pleading the absence of a good and valid award, none have existed since the case of Fisher *v.* Pimbley, 11 East 188. From that time to the present, all matters showing an award not to be good or in pursuance of the submission, if the defect do not appear on
*501] the face of the declaration, *may be taken advantage of on a plea of no award. Bayley, J., there says distinctly,—"A plea of no award means no award *according to the submission;* that is the plain meaning of it." The award as there stated was good: it only became bad because not in accordance with the terms of the submission. Gisborne *v.* Hart, 5 M. & W. 50,† is equally strong in the same way. In Armitage *v.* Coates, 4 Exch. 641,† to a declaration upon an award, the defendant pleaded certain facts to show that the award was not final, and the plea was held to be bad, as amounting to an argumentative denial that the award stated in the declaration was ever made. [WILLIAMS, J.—The plea of nul agard puts in issue whether there has been any award of and concerning the premises.] Fisher *v.* Pimbley and Gisborne *v.* Hart go further. [WILLIAMS, J.—There is a difference between a declaration upon an award and a declaration upon a bond for the due performance of an award.] The distinction is not very obvious: an action upon an award, is nothing more than an action for the breach of an agreement to refer. [COCKBURN, C. J.—The agreement is, to perform the award, provided a valid award is made.] Here, there has been no award at all in reference to the matters submitted. It does not appear that the arbitrator has settled the accounts so as to bind the parties: it will be necessary to have recourse to equity to carry out the award. [WILLIAMS, J.—The arbitrator directs the defendant to pay the balance, which is the result of the accounts between the parties.] That is after making a deduction which he was not warranted in making, viz. for his costs. [WILLES, J.—If the arbitrator had not retained his costs, and his charge had been submitted to taxation, peradventure the difference would have been enough to pay the sum which he has ordered the one party to pay to the other.] Precisely so. The case of In re
*502] Coombs, 4 *Exch. 839,† shows that an arbitrator cannot retain a sum for his charges. Parke, B., in the course of the argument, there says,—"The amount of his own fee is to be excluded, by natural justice; for, it is contrary to reason that an arbitrator or umpire should be sole and uncontrolled judge in his own cause." And, in giving judgment, he says,—"I think that the award is bad, on the ground that the umpire had no jurisdiction to fix his own fee, and to direct the manner in which it was to be paid, under the terms of this submission: and, as that part of the award which is made without jurisdiction, is not separated from that portion of it which is [not] so made, the award cannot be supported." If that be so, this is a difficulty which is not to be got rid of by a reference to the master. In Robinson *v.* Henderson, 6 M. & Selw. 276, an award that the sum of 230*l.* was due from the defendants to the plaintiffs, and that, out of the said sum, the defendants should

pay to the arbitrators 93*l.*, being the expenses of preparing the agreement of reference and their award, and for their charge, trouble, and attendance on the reference and arbitration, and certain costs which they awarded to be paid to the solicitors of the plaintiffs in respect of certain actions mentioned in the agreement of reference, leaving the sum of 130*l.*, which they awarded to be paid to the plaintiffs,—was held void for uncertainty, in directing a sum in gross to be paid to the arbitrators for the objects above mentioned, without specifying the particular sum to be appropriated to each object; the court saying "that there would be danger in permitting arbitrators to award a definite sum, of which a part, including an indefinite allowance to themselves, was ordered to be paid to the arbitrators."

For these reasons, it is submitted, the award is clearly bad.

Cur. adv. vult.

*CRESSWELL, J., now delivered the judgment of the majority of the court.(*a*) [*503

This was a motion to enter a verdict for the defendant, depending upon the validity or invalidity of an award.

The facts are in substance as follows:—Charles Roberts and Henry Eberhardt had been partners in trade as coal-masters and lime-merchants. An agreement to dissolve the partnership upon certain terms was entered into between them. Henry Eberhardt died, having made a will under which he appointed his widow, Mary Eberhardt, his executrix. Charles Roberts and Mary Eberhardt agreed to fulfil the agreement, and referred the settlement of that and of all disputes concerning it to an arbitrator. Charles Roberts and Henry Eberhardt had also been in partnership as attorneys and solicitors; and, by an agreement reciting that differences and disputes had arisen between Charles Roberts and Mary Eberhardt about the last-mentioned copartnership, and the accounts relating thereto,—all matters then in dispute, and all differences that might arise before the making of a final award, were referred to the same arbitrator: and it was agreed that he should also be the receiver of the estate, moneys, and effects of the law partnership, and should get in and settle on such terms as he thought fit all bills of costs due to the estate of the law partnership, "*and dispose of the estate, moneys, and effects of the said law partnership in such manner as he should think best for the interest of the said Charles Roberts and Mary Eberhardt;*" and that the costs and expenses of the reference and award should be in the discretion of the arbitrator.

*The arbitrator made an elaborate award, the particulars of which it is unnecessary to notice. It concluded in these words: [*504 "I certify that *I have deducted and retained to myself the costs of this my award out of the moneys which have been received by me as such receiver as aforesaid.*"

Two objections were taken to this part of the award, viz. that the arbitrator had fixed the amount of his own costs, and had not said by whom they were to be paid. To this it was answered that the real effect of the award was, that there were to be no costs paid to the arbitrator, they having been already paid by him in his character of receiver.

(*a*) The case was argued before Cockburn, C. J., Cresswell, J., Williams, J., and Willes, J. The judgment was that of Cockburn, C. J., Cresswell, J., and Willes, J.

We regret that all the expense and trouble of this arbitration should be thrown away, but feel bound to say that the award is bad. The duty and authority of receiver vested in the arbitrator, was ancillary to his duty of arbitrator, and must have been fully discharged by him before he could be in a condition to make a final award. He does not profess to have paid the costs of the award by anticipation; nor could he do so. If, then, when he made the award, money which he had received as receiver remained in his hands, he was bound to make an award with reference to it; for, his functions as receiver were then at an end, and he cannot say that he applied it as receiver. Nor could he, by professing to act as receiver, obtain authority to fix the amount of his own charges. That could not be done till the award was made. He was, as receiver, functus officio. I agree, that, for misconduct as receiver, he would be responsible in equity; but, in this matter, he was acting as arbitrator, not as receiver, and acted erroneously in the two respects mentioned,—he fixed the amount of his own charges, and did not decide who was to pay them. The rule, must, therefore, be made absolute.

*505] *The question whether it was open to the defendant to impugn the validity of the award upon the plea of nul tiel agard, was disposed of on the argument.

WILLIAMS, J.—I cannot agree that the award is bad on the ground that the arbitrator has omitted to say by whom the costs are to be paid.

By the terms of the deed, I think his office of receiver is made quite distinct from his office of arbitrator. In his character of receiver, he has power to dispose of the moneys he has received as he thinks best for the interest of the parties. And he says, generally, that he has done so. And he also says, particularly, that he thought it best to dispose of some of them by applying them to defraying the costs of the award. This may have been an abuse of his trust as receiver, and he may have been guilty of other breaches of his duty as receiver, in disposing of the rest of the money he has received. But, if this be so, he must, I conceive, be made to account for it, as trustee, in a court of equity. But it is not, I conceive, part of his duty to state on the face of his award how he has disposed of the fund, nor, because he does so incidentally, and discloses what we consider a breach of trust, have we power to set aside the award on that ground.

We can only look at what he has done as arbitrator; and in that character, I think, he has neglected no duty in omitting to adjudicate as to the costs of the award; because he has already thought fit, in his character of receiver, to reduce them to nothing at all, by defraying them out of the money he had in his hands as receiver. It is just the same as if some third party had already defrayed them, or as if the arbitrator had declared in his award that he would act gratuitously, and that therefore there was nothing to pay.

*506] For these reasons, I am of opinion that the rule to *enter a nonsuit should be discharged: but, as the majority of the court have come to a different conclusion, the rule will be absolute.

Rule absolute.

The plaintiff appealed against this decision; and the questions stated

for the opinion of the court of appeal were,—first, whether the award was bad on the grounds stated in the rule, or any of them,—secondly, whether the objection was open and available to the defendant under the issue on the third plea.

If the court of appeal should be of opinion in the negative on either question, then the verdict for the plaintiff on the said issue was to stand, and the nonsuit to be set aside, and judgment to be entered for him for the amount assessed by the jury, with costs of suit. If the court should be of opinion in the affirmative on both questions, the rule for entering a nonsuit was to be confirmed, with judgment for the defendant accordingly.

Hugh Hill (with whom was *M'Mahon*), for the appellant.(*a*)—He repeated the arguments urged in the court below, citing Baspole's case, 8 Co. Rep. 98 a, Perry *v.* Mitchell, 12 M. & W. 792,† and Williamson *v.* Page, 1 Hare 276, and observing upon In re Coombs, 4 Exch. 839.† And he submitted, that, inasmuch as the agreement of reference expressly enabled the arbitrator *to make one or more awards, if the objection were that the award left some of the matters in difference undisposed of, that might be cured by an award made now; and that there was no complaint of Harward in his capacity of receiver. [CROMPTON, J., observed that the arbitrator was bound to make an award that should be certain as to amount; whereas, here, the arbitrator merely states that he has "deducted and retained to himself the costs of that his award, out of the moneys which had been received by him as receiver," without saying how much.] [*507

Bovill, Q. C. (with whom was *C. Pollock*), for the respondent,(*a*) relied upon Robinson *v.* Henderson, 6 M. & Selw. 276, and In re Coombs, 4 Exch. 839.† [WATSON, B., referred to Wood *v.* Wilson, 2 C. M. & R. 241.†]

Hugh Hill, Q. C., was heard in reply. Cur. adv. vult.

There being a difference of opinion amongst the learned judges, they now delivered their judgments seriatim, as follows:—

*WATSON, B.—This was an appeal from a judgment of the Court of Common Pleas, given for the defendant in an action upon an award. [*508

The submission was extremely special. [The learned judge read it.] The arbitrator was also receiver as regards one partnership, to which the parties were entitled in certain proportions. *The costs of the reference*

(*a*) The points marked for argument on the part of the appellant, were,—"First, that the award was not bad on any of the grounds alleged by the defendant,—Secondly, that the objections alleged by the defendant to the validity of the award were not open or available to her under the issue on the third plea."

(*b*) The points marked for argument on the part of the respondent, were,—

"That the award declared upon is bad upon the following grounds:—

"That the arbitrator has awarded to himself and retained for the costs of his award a portion of the moneys of which he was receiver:

"That the arbitrator has determined the amount of his own costs, without having directed who was to pay them:

"That the arbitrator has not made any award regarding certain sums of money received by him, but has only stated in a general way that he has expended them for the benefit of the parties concerned:

"And that the above objections are open to the defendant under the issue taken on the third plea."

and award were to be in the discretion of the arbitrator: and *the arbitrator had the power of making one or more awards.*

The award was duly made, as stated in the declaration, with the addition of this paragraph:—"I hereby certify that I have deducted and retained to myself the costs of this my award out of the moneys which have been received by me as such receiver as aforesaid."

It was contended in argument, on the part of the defendant, that this statement in the award vitiated the award; that the arbitrator could not determine the amount of his own fee; that he could not retain any part of this money out of the funds which came to his hands as receiver; and that this part of the award was uncertain, and not final.

I am of opinion that the award is good, notwithstanding these objections. It is true that an arbitrator cannot conclusively determine the amount of his own fee. But the invariable rule or practice of the profession,—and, I believe, of lay arbitrators also,—is, that the arbitrator fixes in the first instance the amount of his own fee, and retains the award until such fee is paid. The exorbitancy of the fee demanded by the arbitrator does not form any ground for setting aside the award. As between the parties (Miller *v.* Robe, 3 Taunt. 461; Fitzgerald *v.* Graves, 5 Taunt. 342 (E. C. L. R. vol. 1)), the amount of the fee may be referred for taxation by the master. In M'Arthur *v.* Campbell, 5 B. & Ad. 518 (E. C. L. R. vol. 27), Lord Denman, in delivering the judg-
*509] ment of the court, intimates that, *if necessary, as against the arbitrator, the amount of the charge might be referred; and this course was pursued in Musselbrok *v.* Duncan, 9 Bingh. 605 (E. C. L. R. vol. 23), 2 Moore & Scott, 740 (E. C. L. R. vol. 28). It is clear that any excess over a reasonable fee received by an arbitrator, may be recovered back by action: Fernley *v.* Branson, 20 Law J., Q. B. 178; Barnes *v.* Braithwaite, 2 Hurlst. & N. 569.†

In this case, on passing the receiver's accounts, any excess in the amount charged for the arbitrator's fee might be deduced. It is no valid objection to the award, that the arbitrator has taken his fee out of a fund which came to his hands as receiver. He was to incur expenses as arbitrator; and he had a lien upon this fund for those expenses. If there had been no such provision in the award, the parties could not, either at law or in equity, have got that fund without paying his expenses in and about the receivership and the reference, considering they are so much mixed up together. The claim may be objected to as against him as trustee and receiver, but not as arbitrator.

The fee, then, being capable of reduction to a smaller sum, and not being mentioned in the award, and it being merely stated as a fact that the arbitrator had taken it or received the amount from a fund which he held as receiver, I am of opinion that there is no objection to the award on that ground.

It was argued that the award is not certain or final, inasmuch as it is not shown how much of the costs of the reference each party is to pay. It appears to me that this is sufficiently ascertained. The amount is deducted from the gross fund in the hands of the arbitrator in his character of receiver. If this sum was improperly retained by the arbitrator, and was recoverable by the parties from him as receiver, it would belong to them in the proportion of five-eighths to the plaintiff, and

three-eighths to the defendant; and I *come to the conclusion that the costs of the reference and award are to be paid in those proportions; and, consequently, in this respect the award is certain. [*510

The strongest mode of dealing with this part of the award, is, that it should be struck out altogether, as being no award upon the subject of costs. The real objection is, not a want of certainty, but of finality; as, in this view, there is no award as to the party to pay those costs. But, as the arbitrator may still make an award of costs, and the objection is merely a want of finality, that objection is not open to the parties on one award, in a case like this, as the defect might be remedied by a supplemental award.

For these reasons, I am of opinion that the judgment of the Court of Common Pleas ought to be reversed.

BRAMWELL, B.—I also am of opinion that the judgment of the Court of Common Pleas should be reversed. The plaintiff is entitled to recover, unless the defendant can show that the award is void. He alleges that it is,—that the arbitrator had no power to award his own costs, whether he fixed the amount, or left it unfixed. I think he has not *awarded* himself anything. Assuming he has, I agree that he has no such power, on the simple ground that it is not expressly given to him, and that it is not to be intended that he is to be a judge in his own cause. This is supported by authority: see In re Coombs, 4 Exch. 839.† That case, however, does not show that the assumption of this power avoids the award; on the contrary, Parke, B., says,—"As that part of the award which is made without jurisdiction *is not separated* from that portion of it which *is* so made, the award cannot be supported." This shows, that, where separable, an award by an arbitrator of his costs is only an excess of authority, and that the award is bad only pro tanto.

*But it was urged, that, even then, there was no award who was to pay the costs of the reference; and, as the sum applied to that purpose might be excessive, and so might belong to the plaintiff or defendant, or to both in unascertained shares, there was possibly a sum not adjudicated on, and so the award was not final. I am of opinion that this objection cannot be supported. Harward, the arbitrator, filled two characters: he was arbitrator, and he was receiver. In which character did he apply money to the costs of the award? I say, in his character of receiver. He is arbitrator to settle disputes and differences. As a mere arbitrator, he has no power to receive. The agreement of the parties, after appointing him arbitrator, appoints him receiver, and declares that he shall have power to get in (that *must* mean, as receiver) the estate, and to dispose of it as he thinks best for the interest of the parties: that also must mean, as receiver. In his award, he recites that he has got in; and he certifies (not "awards") that he has deducted and retained to himself "the costs of this my award *out of the moneys which have been received by me as such receiver.*" What does this leave unsettled? As receiver, he must render his accounts. If, as he says, he has deducted from the partership assets his costs, he has in effect charged five-eighths to the plaintiff and three-eighths to the defendant. It is said that he may have fixed all the costs on one party, or half on each, or in some other proportion. But he says otherwise; and it is not averred by plea that that is untrue. But, in whatever way he has apportioned the costs, it must appear in his accounts as receiver. The sum awarded to [*511

the plaintiff is 1069*l.* 13*s.* 8*d.* That must be because the defendant is indebted to the partnership more than the plaintiff is, in a sum of which 1069*l.* 13*s.* 8*d.* is five-eighths. But how does Harward ascertain that? Why, by debiting and crediting each *with the appropriate items. So that, if he in his mind settled that Roberts was to pay the whole costs, he has debited him with the whole; and so in any other proportion. Then, when his accounts as receiver appear, this must appear also. It cannot be said that he has no authority to do this as receiver. He has, if it is honestly done for the benefit of both parties. If he has allowed any unjust sum, or if he has, in breach of trust, and improperly, made one party bear too large an amount, no doubt it may be questioned: but the ownership of what is recovered is certain. The case would be made clear if the two offices had been filled by two persons instead of one. Suppose J. S. had been receiver: suppose he had thought it, for the benefit of both parties, good to apply a sum to the payment of the arbitrator's costs, charging to one or both in any proportions,—would it have been necessary for the arbitrator to have done more than say he charged nothing, he was satisfied? That is the case here. The appropriation of a sum to the costs of the award, is the act of the receiver; and the rights of the parties to that sum, or any part, must inevitably be ascertained on production of the receiver's accounts. This is the ground on which the judgment of Mr. Justice Williams in the court below proceeded. It is said his duty as receiver was ancillary, and must have been fully discharged before he could make a final award. With great respect, that is not so; for, he might have awarded, that, taking into account only what had been realized, so much was due to the plaintiff, and then have made a schedule of uncollected assets, declaring their ownership to be five-eighths in the plaintiff, and three-eighths in the defendant. Nor can I see, with all submission, why, if as receiver he thought he could get the award better made by paying for it in advance, he should not do so. I think he might well do it, when it is borne in *mind that the arbitrator might consult counsel, and otherwise be at a large outlay; and he does profess to have done so. In my judgment, he was not functus officio when he paid himself his costs. It is vain to say this reasoning is a refinement. The objection is a refinement; so is the reasoning in support of it. I put my judgment on this plain ground, that, as arbitrator, he could not by his award fix his costs, either by a named sum or otherwise; that his award would be pro tanto void; that, if the liability to the costs remained undetermined at the time of his award, that award is not final; but that it did not and could not then remain undetermined, nor the amount he had paid himself, as his accounts as receiver must show what he had allowed, and whom he had charged with it, if he did not deduct it from the assets; that, as arbitrator, it was enough for him to say he made no charge, for any or no reason; and that, as receiver, his conduct is not before us. But, further, the objection, if any, is, that the award is not final. Then, why cannot the arbitrator make a supplemental award? The argument for the defendant is, that there is a partnership asset not properly allotted, and that there is no award as to who is to pay the costs of the reference. He may "state and separately adjudicate on any particular, and make a separate award on it." Until he has decided all matters, he may well postpone the question of costs. Why, then, can he not make a final award now?

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Nay, how does a want of finality properly arise on a plea of no award, where the award proved need not be final? But I prefer deciding on the other ground.

ERLE, J.—In this case, the court below decided that the award between the parties was void, both because it did not show how the costs of the award were to be paid, and so was not final, and because the arbitrator *had retained, from a fund belonging to the parties which [*514 was in his possession as receiver for them, the amount of his costs before he signed and delivered his award, and so was guilty of such misconduct as made the award void.

I am of opinion that the award is valid, and that neither objection ought to prevail.

With respect to these objections, it is worth while to consider what are the rights and duties of an arbitrator in relation to the costs of his award, as between him and the parties to the submission, contradistinguished from the rights and duties of the parties between themselves in relation thereto.

Where the submission expresses that the arbitrator is to be paid, he might probably recover his fees in an action for work and labour: per Parke, B., in Ex parte Coombs, 4 Exch. 839.† But, in practice, he usually obtains his fee from the successful party, by keeping his award until he is paid; and, in his award, he gives to the party who has paid a right to recover the whole or a proportion from the opponent.

The arbitrator cannot judicially decide the amount of his own fee, whether he specifies it in his award or demands it orally from the parties. If he pursues the usual course above suggested, the party made liable by the award may have the amount taxed, and then is liable to his opponent only according to the allocatur. The opponent who has paid the excess, must, then, have a right to recover it back from the arbitrator by action: Fitzgerald *v.* Graves, 5 Taunt. 342 (E. C. L. R. vol. 1).

If the arbitrator makes an excessive charge to the party finally liable, the court cannot rule him to submit to taxation: Dossett *v.* Gingell, 8 Scott N. R. 179, 2 M. & G. 874 (E. C. L. R. vol. 40); but the question of excess must be raised in an action brought by the party who was in a manner compelled to pay it.

*Whether the amount is stated in the award, or demanded [*515 orally when the award is delivered out, the decision of the arbitrator on his own costs is always subject to some review, because he may not decide finally in his own favour. This amount, which is a matter in difference between him on the one side and the parties on the other, is entirely distinct from the matters in difference between the parties which he is bound to decide finally by his award.

If his award is silent as to his own costs, and he has demanded nothing before he has delivered his award, he has no remedy for his costs; but the award is not the less valid between the parties.

If the award names too much, or the arbitrator has demanded too much orally, and has obtained the amount from the party who is to pay, the question of the excess is to be settled between that party alone and the arbitrator, the opponent having no concern with it. If it is obtained from one party, to be repaid by the other under the award, it is still a distinct subject from the matters in difference between the parties: the amount paid must be proved by evidence extrinsic to the award, and

the alleged excess must also be so proved; and, unless there is excess, there is no ground of objection for any one; and, if there *is* excess, it is only an objection for the party affected thereby.

If the arbitrator, having written his award upon all the matters in difference between the parties, had them both before him, and informed them of the amount of his fee, and claimed half from each, and they paid it, and he then added to the writing of his award, a certificate that he had been paid for his award by the parties at the time of delivering out his award, and then signed and delivered it out, the award would be valid between the parties though each party might sue the arbitrator for
*516] the excess, if he proved these facts, and *that the demand was excessive: nor would it make any difference as to the validity of the award between the parties, whether they attended in person before the arbitrator, and paid in moieties, or attended by separate attorneys or agents, or by one agent representing each, or whether they paid in moieties or in any other proportion, or one paid all.

I now proceed to examine the deed containing the submission here in question, in order to apply these observations.

The deed recites, first, a trade partnership between the plaintiff and the deceased husband of the defendant, dissolved in 1853, upon terms in which Mr. Harward was to act as attorney and prepare some deeds between the parties, and, secondly, a law partnership, and the decease of one partner, and that partnership debts were to be collected and paid, and that matters in difference were to be settled. The deed then authorizes Mr. Harward to act as attorney in completing the dissolution of the trade partnership, and as receiver in respect of the law partnership, with full discretion to receive assets and settle liabilities, and as arbitrator in deciding all matters in difference relating to the law partnership which should be brought before him. These three capacities were distinct from each other,—the deeds to be drawn by the attorney, the accounts to be rendered by the receiver, and the award to be made by the arbitrator, being separate functions.

Having thus considered the rules relating to the costs of the award under such a submission, and the effect of the deed containing this submission, it appears to me that Mr. Harward, as arbitrator, had before him Mr. Harward as receiver and agent duly authorized by each of the parties to apply any part of the fund received for them in payment of the costs of the award, and declared orally what his charge was, and
*517] how apportioned, *and received from the agent of each his proper portion to be duly brought into the account between that agent and his principal.

In the court below, it was assumed that the functions of receiver were ancillary only to those of arbitrator, and that Mr. Harward could not make an award till he had closed his accounts as receiver. But, as I have above shown, the two offices were distinct. If Harward demanded too much as arbitrator, there might be an action for the excess. If he paid it out of the fund received by the receiver, the question would be precisely the same, only the extrinsic evidence of payment of the excess would be adduced from the receiver's account, and not from oral evidence of the fact. If the receiver misappropriated funds, and rendered wrong accounts, the remedy against the receiver would not affect the functions of arbitrator. If Mr. Harward's charges as attorney for the

deeds and instruments he was authorized to draw, were excessive, the taxation of these charges between the attorney and his clients would not affect the functions either of receiver or arbitrator: still, the proof of the excess might be obtained, as to this also, only from the receiver's accounts. This judgment is in accordance with the decided cases, and conflicts with none. In Robinson *v.* Henderson, 6 M. & Selw. 276, the costs of the cause, the reference, and the award, were in the discretion of the arbitrator; and he awarded that the defendant should pay to the plaintiff 230*l.* 8*s.*, being 136*l.* 15*s.* due between them, and 93*l.* 13*s.* for the costs of the reference and award: this was held bad, on affidavits, because the arbitrator awarded one sum for costs of reference and of award, and he had no authority to fix a sum for the plaintiff's costs of reference, but ought only to have said how they should be paid; and because he had blended the costs of the reference, which was a matter in difference between the *parties, with a sum to himself for the award, which he had no right to fix, so that they could not be separated. So, in Ex parte Coombs, 4 Exch. 839,† under a similar submission, the arbitrator awarded one sum to be paid by the losing party to his opponent for costs of reference and award, and, though on affidavit the amounts were severed, yet the court was inclined to hold the award bad for uniting the two in one sum, so that the costs of the reference could not be distinguished from the award, by the award itself: but, by consent of the arbitrator and parties, the whole question of costs was severed from the award and referred for taxation to the master. This case suggests the proper remedy for this defendant. If she has been aggrieved by the amount charged to her account by the receiver, she should by extrinsic evidence of the receiver's accounts show that the grievance exists, and so seek redress from the arbitrator. But, unless she shows by extrinsic evidence that she is aggrieved, the presumption ought to be that all has been rightly done; and no intendment ought to be made by conjecture, that perhaps the receiver has charged to her three-eighths of the assets, a large sum for the costs of the award, which, if credited to her account against the plaintiff, might have reduced the balance given to him by the award. [*518

In both the cases just referred to, the complaint is shown by affidavit; and there is no precedent for holding an award a nullity, upon a plea of no award, thereby exempting a defendant from paying a debt to the plaintiff, and depriving an arbitrator of his compensation, and unsettling much that has been settled, because perhaps the defendant may have paid to the arbitrator too much for the award.

My Brother Channell desires me to say that he concurs in the judgment I have just delivered.

*Wightman, J.—This was an action to recover 1069*l.* 13*s.* 8*d.* awarded to be paid by the defendant to the plaintiff, by an arbitrator acting under two agreements of reference between the plaintiff and the defendant. It appeared that the plaintiff and Henry Eberhardt (the husband of the defendant) carried on business in partnership as coal-masters and lime merchants, and that they were also partners in the profession of attorneys and solicitors, and that, upon the death of Henry Eberhardt, the defendant, his widow and executrix, agreed with the plaintiff to refer all differences respecting the trades of coal-masters and lime merchants to one John Harward; and that subsequently they [*519

agreed to refer all disputes respecting the law partnership to the same arbitrator, and that he should be the receiver of the estate and effects of the law partnership; that he should settle on such terms as he should think fit all bills of costs, and dispose of the estate, moneys, and effects of the law partnership in such manner as he should think best for the interest of the plaintiff and the defendant; that the costs and expenses attending the references under both the agreements, and the award or awards to be made under them, should be in his discretion; that the two references should be considered one; and that the arbitrator might make one award in respect of both references.

The arbitrator in his award states that he had investigated and settled the accounts in the matters referred under both agreements, and received the estate, moneys, and effects belonging to the law partnership, and that he had disposed of the same in such manner as he thought best for the interest of the plaintiff and of the defendant; and he then awards that 1069*l.* 13*s.* 8*d.* is due from the defendant to the plaintiff, and orders her to pay it. He then awards mutual releases, and concludes by certi-
*520] fying that he had deducted and retained *to himself the costs of his award out of the moneys which had been received by him as such receiver; and he directs that each party should bear his and her own costs of the reference. The award is a final award; for, it appears to be an award of *all* the matters referred, and awards mutual releases.

The question is, whether the effect of this clause in the award by which the arbitrator says that he has paid himself the costs of his award out of the money in his hands, and without saying which of the parties was to bear that charge, is to vitiate the whole award. A majority of the judges in the court below held that the award was bad on that ground; and I am of opinion that the judgment of that majority was correct.

The arbitrator was receiver of the estate of the law partnership, with power to dispose of it as he thought best for the interest of the law partnership: but he was bound to make an award with respect to all money remaining in his hands undisposed of at the time of making his award. He says in his award that he has deducted and retained to himself the costs of his award out of the moneys received by him as such receiver as aforesaid. The offices of receiver and arbitrator were united in his person; and, as receiver, he would not be warranted in paying for the award until it was made; and, as arbitrator, he could not award himself a sum for his costs of the award out of the moneys remaining in his hands, and otherwise undisposed of, whilst he executed the functions of a receiver, which were determined when he made his award. If the offices of arbitrator and receiver had been in different hands, and the arbitrator bound, as in this case, to award in respect of all moneys remaining undisposed of in the hands of the receiver, the arbitrator would not have been warranted in making it part of his award, that, out
*521] of the money in the hands of the *receiver, he had received and retained the costs of his award.

The effect is, that, out of a fund which he was to apportion by his award, he has awarded himself a sum for his costs, which, as the fund was under his control, he has paid to himself, without specifying either the amount or the party upon whom the charge is to fall.

Since the case of In re Coombs, 4 Exch. 839,† it may be considered as settled that an arbitrator has no power to award himself a sum for costs, but his doing so would only vitiate the award for the part respecting the costs to himself, unless that part is so connected with the rest of the award as to render it uncertain or not final.

By the terms of the submission to reference, the costs of the award are to be in the discretion of the arbitrator; but he has given no direction as to which of the parties is to pay them. No sum is mentioned as having been retained by the arbitrator for the costs of the award; but it may be that the precise sum is ascertainable: in that case, it may be taxed: but, suppose that upon taxation the amount should be reduced, to whom is the overplus to be paid? This renders the award uncertain and not final; and, though it is greatly to be regretted that the time, trouble, and expense attending the arbitration and award should have been thrown away, it appears to me that the objection is insurmountable, and that the judgment of the court below ought to be affirmed.

CROMPTON, J.—I agree with my Brother Wightman in thinking that the decision of the court below was correct. The arbitrator appears to me to have made no award as to a portion of the fund, of unknown amount, as to which he was bound to make an award and a distribution. He has withdrawn that sum from *the operation of his award, [*522 and has not decided to which party it belonged: he has not shown from which party's share it was taken, nor which party was to bear that loss in the shape of costs; and it is left quite uncertain which party is to have the right of recovering any amount which may turn out to be exorbitant. His award cannot be binding as to the amount which he has chosen to take for his award; and the party or parties from whose share he has taken it, have a clear right to question the fairness of the amount.

By not awarding on whom the costs of the award were to fall, and taking to himself an unknown amount, he seems to me to have left undecided the question as to whom that part of the fund belonged, which may be important, and which he was bound to decide.

It has been said that an award in the nature of a supplemental award might still be made. It seems to me, however, that the award in question is clearly intended as the final award; and the time for making the award seems to have expired: and we are now considering how far the present award is final, and not whether a defect on that ground might be cured, so as to be the foundation of a future action.

I think, therefore, that the decision of the court below was correct, and ought to be affirmed.

The majority of the court being of opinion that the judgment of the court below was erroneous, that judgment was accordingly

Reversed.(a)

(a) The result, upon the whole case, is, that five judges, viz., Cockburn, C. J., Cresswell, J., Wightman, J., Crompton, J., and Willes, J., held the award to be bad, and other five, viz., Erle, J., Williams, J., Bramwell, B., Watson, B., and Channell, B., held it to be good; and that the last-named five by accident formed the "majority." The decision of the Exchequer Chamber was acquiesced in by the defendant.

*523] *IN THE EXCHEQUER CHAMBER.

HICKMAN *v.* COX and WHEATCROFT. *Nov.* 25.

A. and B., who had carried on business as iron-masters, being unable to meet their engagements, assigned all their plant and effects to five trustees, upon trust, amongst other things, to *carry on the business* under the name of "The Stanton Iron Company," and, *out of the profits*, to pay interest on certain mortgages, &c., and to "pay and divide the net income of the business remaining after answering the purposes aforesaid, unto and among all and singular the creditors of A. and B., in rateable proportions according to the amount of their respective debts,"—with an ultimate trust for A. and B.

The Court of Common Pleas having held that the *creditors* who executed this deed, and thus assented to the business being carried on for their benefit, thereby became liable as *partners* for the amount of a bill of exchange accepted in the name of The Stanton Iron Company, in respect of a debt contracted by the trustees in carrying on the trade under it,—the judges of the Exchequer Chamber, on appeal, were equally divided in opinion; Coleridge, J., Erle, J., and Crompton, J., agreeing with the court below that the deed made the creditors partners; Martin, B., Bramwell, B., and Watson, B., holding that it did not.

And it was held, after consideration, that, notwithstanding this equality, there was a sufficient affirmance of the judgment of the court below to justify an appeal under the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, to the House of Lords.

THIS was an action brought by the plaintiff as drawer against the defendants as acceptors of three several bills of exchange in the following form:—

"Grafton Iron Ore Works,
"£300. 0. "Blisworth, 10th March, 1855.

"Four months after date, pay to my order in London three hundred pounds value received. "JOHN HICKMAN."

"Grafton Iron Ore Works,
"£490. 0. 0 "Blisworth, 10th April, 1855.

"Four months after date, pay to my order in London four hundred and ninety pounds value received. "JOHN HICKMAN."

"£616. 11. 0 "Blisworth, June 10th, 1855.

"Three months after date, pay to my order in London six hundred and sixteen pounds eleven shillings, value received.

"JOHN HICKMAN."

Each of these bills was accepted in the following form:—"At Smith, Payne & Smith's, Bankers, London. Per pro. The Stanton Iron Co., JAMES HAYWOOD."

*524] *The defendants severally pleaded, denying that they had accepted the bills, and issues were joined on those pleas.

The cause came on to be tried before Jervis, C. J., at Westminster, at the sittings after Hilary Term, 1856, when a verdict was found for the defendants, leave being reserved to the plaintiff to move to enter the verdict for him. A motion was accordingly made, and a rule to show cause was granted in Easter Term, on the ground that, upon the construction of the deed of the 13th of November, 1849,(*a*) and the evidence given at the trial, the defendants were liable to the plaintiff for the debt sought to be recovered in this action. The rule came on to be argued in Trinity Term, and was made absolute. The facts were as follows:—

(*a*) See the material provisions of the deed set out in the report in 18 C. B. 617 (E. C. L. R. vol. 86).

The plaintiff is an iron-ore master, carrying on business in Northamptonshire; the defendants reside in Derbyshire.

In and previous to the year 1849, Benjamin Smith and Josiah Timmis Smith carried on business in copartnership as iron-masters and iron merchants at the Stanton Iron Works, in Derbyshire, under the firm of B. Smith & Son, and, becoming involved in their affairs, and being indebted, amongst other persons, to the defendants Cox and Wheatcroft, executed a deed, dated the 13th of November, 1849. This deed was executed by more than six-sevenths in number and value of the joint creditors of the said Benjamin Smith and Josiah Timmis Smith whose debts respectively amounted to 10*l.* and upwards. It was made between the Messrs. Smith of the first part, and Francis Sanders, John Thompson, James Haywood, the defendant Wheatcroft, and the defendant Cox of the second part, and the said *Thompson, Haywood, Wheatcroft, Cox, and the other persons whose names were set forth in [*525 the schedule, and who should execute the deed, of the third part. After various recitals, it is witnessed that the Messrs. Smith conveyed and assigned all their estate and effects to the parties of the second part, upon the trusts and subject to the powers contained in the deed.

The deed was executed by the defendants Cox and Wheatcroft as parties of the second part; and their names were also set forth in the schedule, and they executed the deed as creditors for the sums set opposite their names and parties of the third part.

The defendant Cox never acted as a trustee; the defendant Wheatcroft only acted for a few weeks; and, on the 27th of December, 1849, a letter was written by his solicitor, by his authority, to Mr. Huish, the solicitor of the trustees, to the following effect:—"Mr. Wheatcroft finds that his own various engagements will prevent his taking any active part in the duties which his office of trustee imposes upon him; and his total ignorance of the details of the various departments connected with the manufacture and sale of iron equally disqualifies him, even if he had time to attend to them. He therefore wishes you to communicate to his co-trustees his intention to resign the trust from the present time,—an intention he has already made known to them; and they can at once exercise their power of electing one in his stead. As far as I recollect of the deed, it gives the trustees full liberty to retire, and the continuing trustees to elect another: but on this point you will please to send me a copy of the particular clause, and Mr. Wheatcroft shall execute any disclaimer which may be necessary."

This letter was read at a meeting of the trustees held on the 15th of January, 1850, and the following resolution was then passed,— [*526 "16thly. That Mr. *Wheatcroft's resignation be accepted, and that he be informed the vacancy will be filled up at the first meeting of creditors:" and Mr. Huish, the solicitor, on the 15th of the same month, wrote to the defendant Wheatcroft the following letter,—"At a meeting of trustees this day held, your resignation of your trusteeship was accepted; and I am directed to inform you, that, as soon as possible, a trustee will be appointed in your place, when it will be necessary for you to assign to him your estate under the deed."

The creditors were made acquainted with the resignation, but no trustee was ever appointed in the place of Wheatcroft. He afterwards attended meetings of the creditors under the deed,—one in the year 1850,

another in 1852, and another in 1853. After the 29th of December, 1849, the defendant Wheatcroft never acted in any manner as a trustee.

After the execution of the deed, the business of the Stanton Iron Works was carried on for the purposes aforesaid, in the name of The Stanton Iron Company, the said Francis Sanders, John Thompson, and James Haywood, trustees named in the deed, being the acting persons therein until the death of Francis Sanders in December, 1854; from which time until the month of May, 1855, the business was carried on in like manner, the said John Thompson and James Haywood being the acting persons therein. On the 19th of May, 1855, the said James Haywood entered into possession of the works on his own account as mortgagee, when the works were stopped, and the business then ceased to be carried on for the purposes of the said deed, except that the bill of the 10th of June was accepted for iron ore delivered previously to the 19th of May. The bills of exchange on which the action was brought were accepted by the said James Haywood in the form appear-
*527] ing on the bills, on or about the days on which they *respectively bear date, for iron ore previously delivered to the said company by the plaintiff in the year 1853, and thence to 1855; it being the usual practice to give similar bills for ores supplied by the plaintiff. The said James Haywood was financial manager of the business as well as trustee. He was called as a witness on the part of the plaintiff, and stated that it was necessary to accept bills in carrying on the business: he was not cross-examined on this on the part of either of the defendants; nor was there any oral evidence given in contradiction of this statement, nor any written, save if any as herein appears.

At the time the bills were drawn and accepted, the plaintiff, if he had ever heard that the defendant Wheatcroft had been a trustee, had also heard that he had retired from the trust.

The rule having been made absolute to enter the verdict for the plaintiff for 1406*l.* 11*s.* and interest, the defendants appealed against that decision, and the appeal came on for argument in the Exchequer Chamber on the 4th and 5th of February, 1857,—the judges present being Coleridge, J., Erle, J., Martin, B., Crompton, J., Bramwell, B., and Watson, B.

Byles, Serjt. (with whom was *Milward*), for Wheatcroft.(*a*)—The substantial question is, whether creditors who have executed the deed of the 13th of November, 1849, are liable to be sued as partners in the concern
*528] *called The Stanton Iron Company, by reason of the provision in that deed enabling the trustees to carry on the business, and to pay the debts of the parties of the third part rateably out of profits. The bills are drawn upon, and accepted for, "The Stanton Iron Company." [MARTIN, B.—I must confess I do not see how the creditors can be said to be the Stanton Iron Company. The argument on the part of the plaintiff in the court below would have been irresistible, if this had been an action for goods sold and delivered. *Hugh Hill*, Q. C. —The action was commenced under the Bills of Exchange Act, 18 & 19 Vict. c. 67. MARTIN, B.—A count may be added for goods sold and

(*a*) The points marked for argument on the part of the defendant Wheatcroft, were,—
"That he was not liable to the plaintiff; that he was not responsible in the character of a trustee, having, to the knowledge of the plaintiff, ceased to be such long before the giving of the bills; that he was not liable in the character of one of the creditors of Smith & Son, or in any other way; and that the acceptances of the bills in question did not bind him."

delivered when the plaintiff comes to declare. That is universally allowed.] The cases bearing upon the question are only two,—Owen *v.* Body, 5 Ad. & E. 28 (E. C. L. R. vol 31), 6 N. & M. 448 (E. C. L. R. vol. 36), and Janes *v.* Whitbread, 11 C. B. 406 (E. C. L. R. vol. 73), which professes to be founded upon it. Now, in Owen *v.* Body, the Court of Queen's Bench did not decide that the deed constituted a partnership: all the court say, is, that "the deed imposed such terms as might have constituted a partnership among the persons executing it; and those were terms to which creditors were not bound to submit;" and that therefore the assignment was invalid. [MARTIN, B.—I never could understand that case. CROMPTON, J.—I, like my Brother Martin, have always felt very much puzzled by Owen *v.* Body.] The case is very well explained by the remarks which fell from Jervis, C. J., and Maule, J., in Janes *v.* Whitbread, 11 C. B. 416, 417. And the case of Owen *v.* Body is still further qualified by Coates *v.* Williams, 7 Exch. 205.† The deed now in question has undergone discussion before the Master of the Rolls in a case of In re The Stanton Iron Company, 21 Beavan 164, where this company was held not to be within the provisions of the winding-up acts. His Honour says: "The question really is, whether the deed *of the 13th November, 1849, constituted a partnership [*529 between the parties thereto, so as to bring it within the provisions of the winding-up acts. I have two things to consider,—the relation in which the parties to the deed stand to each other, and their relation to third parties. There can be no doubt that persons may be partners towards the world, and yet not be partners as between themselves. This is a very common case; and every body is familiar with Waugh *v.* Carver, 2 H. Bl. 235, a leading case on this subject. But, on the other hand, persons who are partners between themselves are necessarily partners as respects the public. Now, it appears that this deed does not constitute a partnership between the parties who have executed this deed, but it is a deed for the benefit of the Messrs. Smiths, rather than for that of the creditors. The surplus profits and the residue of the trust estate are treated as the property of the Messrs. Smiths; the persons executing the deed of the third part are not held out to the world as partners, or as having anything to do with the business or [of] the partnership, and I see no ground for supposing that they could, under any circumstances, be held personally liable to the creditors in respect to the management of the business. What you have to consider in a case of partnership, is, what is the proportion of capital and labour which is introduced or contributed by each of the partners, and what is the proportion in which the profits or dividends are to be divided amongst them. I will assume that the argument of the petitioner is right, viz. that the proportion of stock or capital contributed is represented by the amount of the debt of each party: but I will suppose (which I think is a proper way of testing it) that this was a business newly established, and, instead of debts forming the capital or stock, that the creditors who were parties of the third part had advanced the *respective sums of money which now [*530 stand opposite their respective names in this deed, that is, about 50,000*l.* Suppose they advanced these sums of money to certain other persons, five in number, to establish and carry on a business on this condition,—that out of the profits they shall be repaid the sums which they have advanced simply, and that then the business and the whole surplus

profits shall be transferred and belong to certain third parties. Could it be said that this was anything more than a mere loan for the purpose of establishing a partnership? If I were to hold that persons were partners under such circumstances, it would hardly be possible for any one to advance money to a partnership, to be repaid out of the profits, without making themselves partners: but such a case is not a partnership, and possesses none of the properties of a partnership, of which, indeed, the ordinary test and criterion are wanting." Then, how stands the case upon principle? Assuming that the true criterion of partnership is that given by Tindal, C. J., in Pott *v.* Eyton, 3 C. B. 32, 39 (E. C. L. R. vol. 54), as deduced from Grace *v.* Smith, 2 W. Bla. 998, and Waugh *v.* Carver, 2 H. Bla. 235,—"Traders become partners between themselves by a mutual participation of profit and loss: but, as to third persons, they are partners if they share the profits of a concern, for, he who receives a share of the profits, receives a part of that fund upon which the crediters of the concern have a right to rely for payment, and is therefore to be made liable to losses, although he may have expressly stipulated for exemption from them,"—how does that apply here? In ordinary cases, where a man participates in profits, those profits are an acquisition to him: he gets something which he had not before. Do the creditors here get anything? Suppose one of them is paid in full, he gets nothing more than he is entitled to set against his debt. Again, in the ordinary case, the *situation *531] of the creditors en masse is prejudiced by the withdrawal of profits: but here it is not so; the general fund, as compared with the demands of the general body of creditors, remains as it was. The principle that participation in profits creates liability, is, that it takes away the means of paying the debts of the concern. But this arrangement, so far from taking away the means of paying debts, actually pays them. [MARTIN, B.—You are confounding the two sets of creditors. The Smiths are indebted to several persons, amongst others, to the defendants. They assign all their property and effects to certain trustees, upon trust, with the assent of the creditors, to carry on the trade as The Stanton Iron Company, and, out of the profits, to pay the creditors their several debts; with an ultimate trust for the Smiths. The partnership thus created is a new partnership. The person suing is a creditor of the new firm, between whom and the creditors of the old firm there is no relation. There is a marked distinction between the two classes of creditors. COLERIDGE, J.—The question is, whether the trustees are not carrying on the business for the old creditors, so as to make them partners as to all the rest of the world.] This is not a question of holding themselves out to the world as partners: the simple question is, what is the interest they have in the concern? do they contract to receive a share of profits quâ profits? Is it anything more than a trader inducing his old creditors to forbear to sue him, upon his undertaking to pay them 20*s.* in the pound out of the profits of his future trading?(*a*) [COLERIDGE, J.—Suppose the creditors had consisted of three persons only, instead of seventy or eighty, would you have contended that the deed did not *constitute them partners?] Cer- *532] tainly. This is not a case where the payments to the old creditors exhaust the assets. The old creditors, it is true, are to receive

(*a*) An undertaking into which every discharged insolvent debtor impliedly enters.

payment out of the profits of the trade; but the deed gives priority to the new creditors. [CROMPTON, J.—Your argument assumes that the trustees are the agents of the Messrs. Smith. Is not that begging the question? The creditors executing the deed assent that the trustees shall carry on the trade for their benefit. Do they not constitute them *their* agents for that purpose?] There is nothing in the arrangement contemplated by the deed which can in any degree affect the ability of the trustees to meet any engagements they may have entered into: nor is it unusual for deeds of this sort to contain provisions for the carrying on of the trade. [COLERIDGE, J.—As ancillary to the winding up of the concern.] The principle laid down in Grace *v.* Smith, 2 W. Bl. 998, and Waugh *v.* Carver, 2 H. Bl. 235, and upon which the whole doctrine of partnership reposes, is, that "he who takes a moiety [or other share] of all the profits indefinitely, shall, by operation of law, be made liable to losses, if losses arise, upon the principle, that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." The present case, it is submitted, does not fall within that definition: the old creditors here do not take a share of the profits indefinitely; all they do, is, to agree, that, if there be anything to spare after paying the expenses of the concern and meeting its new engagements, it shall go rateably among them in satisfaction of their respective debts.

Welsby (with whom was *Bovill*, Q. C.), for the defendant Cox.—One who is charged as the acceptor of a bill of exchange can only be so charged by reason of his *having actually accepted it himself, [*533 or of its having been accepted by some person by procuration for him. Here, the bills purported to be accepted by the Stanton Iron Company. Now, in order to see who are the Stanton Iron Company, we must have recourse to the deed; and there we find that it is the trustees and not the creditors who are to carry on the concern: and, though it may be that any one who is shown to be a dormant partner might be liable to be sued for goods sold and delivered, none but those who are parties to the instrument can be sued upon a bill of exchange. The deed is a good and valid deed within the authority of Janes *v.* Whitbread, 11 C. B. 406 (E. C. L. R. vol. 73), and Coates *v.* Williams, 7 Exch. 205,† the main object of it being, so far as the creditors are concerned, the winding up of the partnership, and the rest being merely ancillary: the recitals show that. And it is expressly provided that all the debts incurred by the trustees shall be paid before any division of profits amongst the old creditors shall take place. [ERLE, J.—The trustees would have been guilty of a breach of trust if they had paid any portion of the debts of the old creditors before all the claims of the new creditors were satisfied.] Neither upon any decided case, nor upon any principle of law, can the creditors who executed this deed be held thereby to have bound themselves as partners in the Stanton Iron Company. According to all the cases, in order to constitute a partnership, there must be a community of profits. What is a community of profits? Clearly not that the party looks to the profits for payment of his demand. If that were so, every retiring partner, and every person who lends money to a firm, would thereby become a partner. Dr. Story, in his work on Partnership, § 66, says: "It may be generally stated that a person who lends money to a firm, and is to

*534] receive therefor a fixed interest (whether usurious or otherwise, *is not material), or an annuity certain as to amount and duration, will not thereby become, as to third persons, a partner in the firm; for, in such a case, there is no mutuality of profit with the firm, and no general participation in the casual and indefinite profits which, as we have seen, constitutes one of the ingredients of partnership. Cases of this kind often occur upon the retirement of a partner leaving money or funds in the hands of the firm, and upon the decease of a partner who bequeaths an annuity to his widow out of the profits; and in neither case will the retiring partner or the widow be held a partner as to third persons, as he or she certainly is not as to the partners themselves. It is true that it may be said that the retiring partner or widow has, in a certain sense, an interest in the profits. But the same suggestion may be made as to creditors of the firm. If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade; and yet the lender is generally interested in those profits. He relies on them for repayment. And there is no difference whether money be lent de novo, or be left behind in the trade by a retiring partner; or whether the terms of the loan be kind or harsh." By mutuality of profits, the learned author means the interest which all the partners have in the profits made by each and every of them: in this sense, mutuality and community of interest are convertible terms. [CROMPTON, J.—Is there not community of interest here?] It is submitted that there is not. There is no agreement here for a community or mutual participation of profits. [CROMPTON, J.—To the extent of the sums due to the several creditors, surely.] The whole sum the creditors can receive, is 20*s.* in the pound upon their respective debts. [COLERIDGE, J.—Suppose a man invests 10,000*l.* in a concern, with an agreement that he shall be repaid the principal *535] *and interest out of the profits as they arise,—is he not a partner?] Clearly not, though that case differs widely from the present. Story in § 67 says: "The true criterion by which we are to distinguish cases of this kind from cases in which there is a partnership as to third persons, is, to ascertain whether the retiring partner, or lender, or annuitant, is to receive a share of the profits as profits, or whether the profits are relied on only as a fund of payment; or, in other words, whether the profit, or premium, or annuity, is certain and defined, or is casual, indefinite, and depending on the accidents of trade. In the former case, it is a loan; in the latter, a partnership. The hazard of profit or loss is not equal and reciprocal, if the retiring partner, or lender, or annuitant, can receive a limited sum only for the profits of the loan or other fund; and therefore the law will not deem him or her a partner, since there is an utter want of mutuality of right and interest in the profit." The true criterion seems to be this, that, where the amount to be realized out of the profits is undefined and varying by the expansion or contraction of the business, the recipient is a partner. [ERLE, J.—Then, according to your definition, a foreman or manager whose salary varies as the profits of the trade vary, would be a partner.] That would be a mere mode of payment for services, which, like the customary contract on a Greenland voyage, would not create a partnership,—Wilkinson *v.* Frasier, 4 Esp. N. P. C. 182. The servant, under such a contract, foregoes all remuneration for his labour, unless the business is productive

of profit. The creditors here forego nothing but the right to receive present payment of their debts,—consenting to take them by instalments varying in amount as the profits may vary. [BRAMWELL, B.—I have always considered it as a question of agency. CROMPTON, J.—The cases assume that agency is to be presumed from *perception of profits. [*536
In Cheap *v.* Cramond, 4 B. & Ald. 663 (E. C. L. R. vol. 6), a merchant in London recommended consignments to a merchant abroad, and it was agreed that the commission on all sales of goods recommended by one house to the other should be equally divided, without allowing any deduction for expenses; and it was held that this was a participation in profit, and constituted a partnership between the parties quoad hoc.] The principle established in Grace *v.* Smith, 2 W. Bl. 998, and recognised and adopted by so many subsequent cases, and, amongst others, by Waugh *v.* Carver, 2 H. Bl. 235, Pott *v.* Eyton, 3 C. B. 39 (E. C. L. R. vol. 54), Barry *v.* Nesham, 3 C. B. 641, and Heyhoe *v.* Burge, 9 C. B. 431 (E. C. L. R. vol. 67),—that he who takes part of the profit takes a part of that fund on which the creditor of the trader relies for his payment, and thereby renders himself liable as a partner,—is totally beside the present case. Here, the parties to the deed of the third part are absolutely and in terms precluded from taking out of the fund any part of that which ought to go towards payment of the debts of the new creditors. [CROMPTON, J.—According to the terms of the deed, when a certain amount of profit is realized, a dividend is to be made. Is not the new creditor prejudiced by that arrangement? The next time a balance is struck there may be a loss.] The distribution is to be made, subject to all the existing liabilities of the concern. [BRAMWELL, B.—Suppose the arrangement had been that the old creditors should take nothing until the concern was finally wound up,—would that constitute a partnership?] Clearly not: and that in substance is this case. Speaking of Bloxam *v.* Pell, cited 2 W. Bl. 999 (which was relied on for the plaintiff in the court below), Dr. Story says,—Story on Partnership, note to § 68,—"This case seems to stand upon the utmost verge of the law, even if it be at all maintainable. It differs from Grace *v.* Smith principally *in the circumstance that the [*537
annuity was determinable upon the contingency of the death of the partner, and there was a right to inspect the books. But, as the interest was fixed, and the annuity for a determinate term, although liable to be defeated by the happening of the contingency of the death of the party, it does not seem easy to see how either the interest or the annuity can be properly treated as a payment to be made exclusively out of the profits. The right to inspect the books may seem more strongly to indicate a partnership: but ought it to be decisive? See Gow on Partnership, Ch. 1, pp. 21, 22 (3d edit.); Cary on Partnership, pp. 8, 14, 171. Certainly, an annuity of a fixed sum, determinable on the death of the annuitant, or of the partner, cannot per se be treated as creating a partnership as to third persons, when payable in lieu of the profits of the trade; for, there is no mutuality in the profits, and no sharing of profit and loss, as it is not made payable out of the profits exclusively."(*a*) In Ex parte Wilson, In re Colbeck, Buck's B. C. 48,

(*a*) See Ex parte Chuck, 8 Bingh. 469 (E. C. L. R. vol. 21), 1 M. & Scott 615 (E. C. L. R. vol. 28); Young *v.* Axtell, cited 2 H. Bl. 242; Holyland *v.* De Mendez, 3 Meriv. 184; Watson on Partnership, 2d edit. ch. 1, pp. 11, 12.

the retiring partner reserved to himself an interest in the profits of the trade: "for," as Lord Eldon says, "the annuity he reserved was not merely an annuity the amount of which was calculated with reference to the then present profits, but it was to be paid out of the profits, and to be subject to abatement or enlargement as the profits might fluctuate." The case of Ex parte Wheeler, In re Mallam, Buck's B. C. 25, proceeded upon the same principle. With regard to Owen *v.* Body, 5 Ad. & E. 28 (E. C. L. R. vol. 31), 6 N. & M. 448 (E. C. L. R. vol. 36), the first observation which suggests itself, is, that, if the court meant to decide that the
*538] deed created a partnership, the case is not law. *But it is obvious, when the course of the argument on the part of the defendants is looked at, that the court decided no such thing: the only question presented for decision was, whether or not the deed was a valid deed under the statute 13 Eliz. c. 5. All the court say, is, that "the deed imposed such terms as *might* have constituted a partnership among the persons executing it; and those were terms to which creditors were not bound to submit." [Erle, J.—Owen *v.* Body is a perfectly sound case, if properly understood: the question was whether the deed enured as a bonâ fide assignment within the authority of Pickstock *v.* Lyster, 3 M. & Selw. 371.] In the present case, the creditors who execute the deed do not contemplate the acquisition of any interest in the land or the chattels. Neither on principle nor upon authority can such a deed be held to create a partnership.

Hugh Hill, Q. C., for the plaintiff below.(*a*)—Where a number of individuals agree together that a trade shall be carried on,—whatever stipulations they may make as between themselves for the protection of any among them from liability to losses,—if they contract for a participation in profits (whether gross or net), that agreement constitutes them partners quoad persons who deal with and trust the firm. In the present case, there has been an arrangement between the defendants and others to carry on business under the name of The
*539] *Stanton Iron Company, part of the arrangement being that the defendants are to participate in the profits which are to result from the business so to be carried on. What are profits? Gross profits are, the apparent gains which result from the business, without taking into consideration the expenses incurred in carrying it on. Net profits are, those which remain after allowing for all expenses. The trusts of this deed are as large and comprehensive as can be conceived. The whole of the property and effects of the Messrs. Smith are vested in the trustees, who are to collect the debts, and to carry on the business, and to divide the net income of the business remaining after payment of the interest on mortgages and the new debts and expenses of the trade, amongst the creditors in rateable proportions according to the amount of their respective debts. The deed then goes on to empower a majority in value of the creditors present at a meeting to alter the trusts and the mode of carrying on the business, and to order its discontinuance, &c. The trust for sale only takes effect in the event of the business being thus ordered by the creditors to be discontinued. Can it

(*a*) The points marked for argument on the part of the plaintiff, were,—

"That the defendants are liable to the plaintiff's demand, as being members of The Stanton Iron Company, and parties to the deed, and as creditors by whom and for whose benefit the business of The Stanton Iron Company was carried on; and that the defendants were also liable by reason of their having executed the deed as parties of the second part."

be said that this was not an agreement between the parties to carry on the business and to participate in the net profits thereof? Who but the creditors at large had the means of carrying on the trade, or an interest in the profits? Each of the creditors agrees to exonerate the Messrs. Smith from their respective debts, and that the business shall, unless otherwise ordered at a general meeting, continue to be carried on until the net profits shall have discharged all their debts. In Story on Partnership, § 23, it is said: "It may be laid down as a general rule of the common law, that, in order to constitute a partnership, it is not essential that the partners should equally share the profits and losses. It is sufficient if they are to share in the profits of the business, after a deduction *of the losses; or, in other words, that they should share in the net profits according to their respective proportions. It is, therefore, competent for the partners by their stipulations to agree that the profits shall be divided, and, if there be no profits, but a loss, that the loss shall be borne by one or more of the partners exclusively, and that the others shall, inter sese, be exempted therefrom." Suppose a son takes a business and plant by devise from his father, and, having no capital of his own, borrows a sum of money, subject to an arrangement that the property shall be vested in an agent, to revert to the devisee as soon as the money advanced and interest should have been repaid out of the net profits of the trade,—would not the persons who advanced the money under that arrangement be liable as partners for goods supplied for carrying on the business, or for bills accepted in the ordinary course of it? And, can it make any difference, whether the person intrusted to carry on the business be called an agent or a trustee? [BRAMWELL, B.—Suppose there had been an absolute covenant by the trustees here to pay and divide 10,000*l.* a year amongst the creditors, all the other provisions of the deed remaining the same,—would you say that a partnership was thereby created? If you answer in the affirmative, how do you get over this difficulty,—that a man taking a mortgage, with a clause enabling him to wind up the business, would thereby render himself liable as a partner? And, if you answer in the negative, I would ask whether that arrangement would not be more detrimental to the estate than an arrangement whereby only net profits are abstracted from it? and why that which is less detrimental to the new creditors should be held to constitute a partnership, whilst that which is confessedly more so should not?] The real question is,—who are the parties carrying on the trade? Not the Messrs. Smith *certainly: for, they have parted with everything, and have no right to interfere: the only interest they have, is, in that which may remain after all the debts are paid. Mr. Justice Maule's exposition (in Janes *v.* Whitbread, 11 C. B. 416 (E. C. L. R. vol. 73) of Owen *v.* Body puts that case upon a plain and intelligible footing. He says,—"All deeds of this sort are within the letter of the 13 Eliz. c. 5, s. 2, which declares that all deeds made to or for any intent or purpose before declared and expressed, shall be void,—that is, all deeds made to or for any of the intents or purposes mentioned in s. 1, viz. 'to delay, hinder, or defraud creditors and others of their just and lawful actions, suits, and debts,' &c. In Pickstock *v.* Lyster, 3 M. & Selw. 371, however, it was decided, that, if a man assigns all his property to a trustee *simply with the purpose of having it fairly distributed among all his creditors*, such an assign-

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ment, although it may have the effect of hindering and delaying a particular creditor of his execution, is not within *the spirit* of the act, and therefore is not void,—because it does not deprive any of the creditors of his fair share of the debtor's property, if he chooses to become a party to the deed. The deed in Owen *v.* Body differed from ordinary deeds of this sort, on the ground that it was not simply an assignment for equal distribution, but one by which each creditor was to participate in the proceeds only on condition of his assenting to the trustees carrying on the trade as they pleased, until interrupted by the major part of the creditors. The observation of Lord Denman,—that 'the deed imposed such terms as might have constituted a partnership among the persons executing it; and those were terms to which creditors were not bound to submit,'—means no more than this, that the deed before him was not such a deed as it was reasonable to expect a creditor willing to take his
*542] fair share of the debtor's property, *to accede to; just as an offer of payment accompanied by a requisition of a receipt in full of all demands, is not such a tender as the creditor is *bound* to accept,—that is, his position is not deteriorated by his rejection of it. In that case, there were large provisions for the carrying on the trade, and the creditors were to look to the future profits." And, in giving judgment, the same learned judge says: "The main object of the deed in that case (Owen *v.* Body) was, the carrying on an extensive business for the purpose of making money to pay the creditors who became parties to the deed. Here, the object is, merely to wind up the concern. That is a plain, clear, and intelligible distinction." Can any one doubt that the main object of *this* deed was, the carrying on the business for the purpose of making money to pay the creditors who became parties to it? [Bramwell, B.—I take it to be indisputable law, that, if ten persons agree that three of them shall ostensibly carry on trade, buying and selling for the benefit of the whole ten, one who deals with them may, so soon as he discovers the secret stipulation, insist that he dealt with the whole ten. What is the effect of this deed? Is it that the trade and effects of the Messrs. Smith substantially and beneficially vested in *the creditors*, so that, when the plaintiff sold his ore to The Stanton Iron Company, he sold it to the whole body of the creditors?] That, it is submitted, is the effect of the transaction. [Bramwell, B.—If you satisfy me of that, you succeed in removing a great deal of my difficulty.] What was there to prevent the creditors from exercising their power of winding up the concern and selling the effects the very day after the plaintiff's ore had been delivered at the works of the company? All the authorities bearing upon this subject were referred to in the argument in the court below. There is not a case from the time of Grace *v.*
*543] Smith to the present that does *not recognise the rule that an agreement for a participation in profits constitutes a partnership quoad third persons. It is urged on the part of the defendants, that that applies only where the party stipulates to receive something to which he was not before entitled, and not, as here, where he merely stipulates to receive payment of a debt. That, however, is a mere play upon words: if a man takes under any pretence a share of the profits of a concern, he takes a portion of that fund upon which the creditors have a right to rely for payment of their debts. Then, it is said that the fund is not diminished by the payment of debts. But, the fallacy

of that argument is, that it supposes that the parties receiving payment are creditors of The Stanton Iron Company; whereas, in truth, they themselves are The Stanton Iron Company.

Field, on the same side.(*a*)—That agency is not the ground upon which the liability as a partner rests, but participation in profits, is clear from the case of Waugh *v.* Carver, 2 H. Bl. 235. In that case, there was a complete negation of agency, and yet it was held, that, quoad third persons, a partnership was created. The same doctrine is laid down in Grace *v.* Smith, 2 W. Bl. 998. In the notes to Waugh *v.* Carver, in 1 Smith's Leading Cases, 4th edit. 740, after adverting to the definition of partnership given by Tindal, C. J., in Green *v.* Beesley, 2 N. C. 108, 112 (E. C. L. R. vol. 29), 2 Scott 164 (E. C. L. R. vol. 30),—"a mutual participation in profit and loss,"—the learned editors say: "but, with respect to third persons, an *actual* partnership is *considered [*544 by the law to subsist wherever there is a participation in the *profits*, even though the participant may have most expressly stipulated against the usual incidents of that relation: see Bond *v.* Pittard, 3 M. & W. 357.† Such stipulations will, indeed, hold good between himself and his companions, but will in no wise diminish his liability to third persons. And this is founded on a principle of justice to the community; for, to use the language of the Lord Chief Justice in the principal case, by taking part of the profits he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." "On the above principles it is that a *dormant partner*, i. e., a partner whose name does not appear to the world as part of the firm, is held responsible for its engagements, even to those who, when they contracted with the firm, were ignorant of his existence." And again, at p. 742—"It has been said that a participation in the profits constitutes a partnership. But the participation must be that of a person having a right to a share of the profits, and to an account, in order to ascertain his share, not that of a mere *servant* or *agent* receiving, in respect of his wages, a sum proportioned to a share of the profits, or which may be partly furnished out of the profits." Can there be a doubt that the creditors here had a right to an account of profits? [BRAMWELL, B.—My impression is, that the "rule," as it is called, is sheer nonsense. Where there is a right to participate in the profits, there is a joint interest in the goods. But, whether there is such joint interest must depend upon the circumstances.] Lord Eldon, in Ex parte Hamper, 17 Ves. 403, 412, says: "It is clearly settled, though I regret it, that, if a man stipulates, that, as the reward of his labour, he shall have, not a specific interest in the business, but a given sum of money, even in proportion to a given quantum of the profits, that *will not make him a partner; but, if he agrees for a part of the [*545 profits, as such, giving him a right to an account, though having no property in the capital, he is, as to third persons, a partner; and, in a question with third persons, no stipulation can protect him from loss." In an earlier stage of the same case, p. 404, his Lordship says: "The cases have gone to this nicety,—upon a distinction so thin that I cannot

(*a*) *Welsby* (who had himself been improperly heard, with *Byles*, Serjt., in support of the appeal) objected to *Field* being heard contrà in addition to *Hill*: but, after a slight discussion, the objection was withdrawn, and *Field* was allowed to proceed,—upon the principle, doubtless, that the one impropriety cured the other.

state it as established upon due consideration,—that, if a trader agrees to pay another person for his labour in the concern a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner: but, if he has a specific interest in the profits, *as profits*, he is a partner." In Heyhoe *v.* Burge, 9 C. B. 431, 458 (E. C. L. R. vol. 67), Cresswell, J., delivering the judgment of the court, says: "It has been decided in so many cases that an agreement between the parties to be jointly interested in the profits of one transaction, constitutes a partnership, and authorizes them to do all that is necessary to obtain profits, as usual in such matters, that the rule cannot now be shaken." The distinction between a loan to a trader and a charge on or participation in the profits of the trade, is well stated in the very lucid judgment of Tindal, C. J., in Pott *v.* Eyton, 3 C. B. 32, 39 (E. C. L. R. vol. 54). "Traders," he says, "become partners between themselves by a mutual participation of profit and loss: but, as to third persons, they are partners if they share the profits of a concern; for, he who receives a share of the profits, receives a part of that fund upon which the creditors of the concern have a right to rely for payment, and is therefore to be made liable to losses, although he may have expressly stipulated for exemption from them: Grace *v.* Smith, 2 W. Bla. 998; Waugh *v.* Carver, 2 H. Bla. 235. But, in the former of those cases, Lord Chief Justice De Grey, after laying down the rule of law in the
*546] terms which I have mentioned, proceeds: *'If any one advances or lends money to a trader, it is lent on his general personal security. It is no specific lien upon the profits of the trade; and yet the lender is generally interested in those profits; he relies on them for repayment.' Afterwards he says, 'I think the true criterion is, to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment,—a distinction not more nice than usually occurs in questions of trade and usury. The jury have said that this is not payable out of the profits.' So, in the present case, the jury have said there was no agreement to share the profits. This distinction has been recognised in many cases; of which it may suffice to mention Dry *v.* Boswell, 1 Campb. 329, and Benjamin *v.* Porteus, 2 H. Bla. 590. And, although in Ex parte Hamper, 17 Ves. 404, Lord Eldon said the distinction was so thin that he could not state it as established upon due consideration, yet he acted upon it in that case, and again in Ex parte Watson, 19 Ves. 459, where he said,—'One who receives a salary, not charged upon profits, according to a well-known though nice distinction, is not by that a partner.' Nor does it appear to make any difference whether the money is received by way of interest on money lent, or wages, or salary as agent, or commission on sales." Here, the debts due to the old creditors constitute a specific charge upon the profits of the trade, which brings the case precisely within the rule thus laid down. And it makes no difference that the charge is limited by the amount of the debts: for, there was a similar limitation in Barry *v.* Nesham, 3 C. B. 641 (E. C. L. R. vol. 54). Ex parte Wilson, Buck's B. C. 48, is an authority for the plaintiff upon this point: the party was held to continue a partner because "the annuity he reserved was not merely an annuity the amount of which
*547] was calculated with reference to the *then present profits, but it was to be paid out of the profits, and to be subject to abatement

or enlargement as the profits might fluctuate." The opinion expressed upon this deed by the Master of the Rolls in the case of In re The Stanton Iron Company, 21 Beavan 164, is not consistent with the authorities at common law. Besides,—as was observed by Willes, J., in the course of the argument in the court below,—the provisions of the winding-up acts apply only to the parties inter se, and have no application to a question like the present. And the Master of the Rolls, in Ex parte The Warkworth Dock Company, 18 Beavan 629, speaking of the Companies Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 16, s. 36, and the Winding-up Act, 11 & 12 Vict. c. 45, says: "The functions of the two acts are distinct and separate. The object of the Winding-up Act was, to obtain a proper contribution between the members of the partnership, and to have their rights and liabilities ascertained inter se. The creditors have nothing to do with this; and they may have execution against the company in any way they may think fit. I assisted in framing that act of parliament, and I certainly know that it was not the object to delay the creditors until the rights of the parties had been ascertained. The object of the Winding-up Act was only to settle equities between the parties, in order that, when the partnership was wound up, they might obtain contribution from each other." [BRAMWELL, B.—The question is, whether these defendants have not by becoming parties to this deed, constituted themselves partners as to third persons. I should very much like to be informed what that means. MARTIN, B.—Would an acceptance of a bill in the name of The Stanton Iron Company, by any one of the creditors, parties to the deed, have bound the company?] It is submitted that it would, if accepted for the purposes of their trade. [MARTIN, B.—How is a *bonâ fide holder for [*548 value to know the purpose for which the bill is accepted?] Seeing that the bill purports to be accepted per procuration, he would be bound to inquire into the authority: Attwood *v.* Munnings, 7 B. & C. 278 (E. C. L. R. vol. 14), 1 M. & R. 66 (E. C. L. R. vol. 17); Alexander *v.* Mackenzie, 6 C. B. 766 (E. C. L. R. vol. 60). The acceptance is the acceptance of the firm: The South Carolina Bank *v.* Case, 8 B. & C. 427 (E. C. L. R. vol. 15), 2 M. & R. 459 (E. C. L. R. vol. 17), Vere *v.* Ashby, 10 B. & C. 288 (E. C. L. R. vol. 21).

Welsby, in reply.—In the case of The South Carolina Bank *v.* Case, the ground of the decision was, that the holders of the bills were not bound by the secret instructions under which the parties were carrying on their business. In one sense, every creditor has an interest in the profits of his debtor's trade: but that is not such a community or mutuality of interest as will invest them with the character of partners. Here, the trustees, and not the creditors, are interested in the stock. [ERLE, J.—No doubt, at law, the trustees, and not the general body of creditors, would be the owners of the goods. MARTIN, B.—The case of Sparling *v.* Parker, 9 Beavan 450, has a tendency to show what is the nature of an interest in final results.] All the liabilities of partnership, like those resulting from the relation of husband and wife, arise from agency: but the law, in the former case, implies agency from participation in profits. In none of the cases relied upon on the other side was the right to participate in profits limited to a fixed sum. The decision of the court below proceeds entirely upon Owen *v.* Body, 5 Ad. & E. 26 (E. C. L. R. vol. 31), 6 N. & M. 448 (E. C. L. R. vol. 36), as that case is supposed

to be recognised by Maule, J., in Janes v. Whitbread, 11 C. B. 406 (E. C. L. R. vol. 73). But that recognition of it is only inasmuch as it relates to the statute of Elizabeth. And the reasons given in the judgment of the Lord Chief Justice are clearly inconclusive and inaccurate.

*549] [WIGHTMAN, J.—Who would *take by survivorship here,—the survivor of the trustees, or of all the creditors?] The survivor of the trustees, unquestionably. [WATSON, B., referred to Wightman v. Townroe, 1 M. & Selw. 412. There, the executors of a deceased partner continued his share of the partnership property in the trade for the benefit of his infant daughter: and it was held that they were liable upon a bill drawn for the accommodation of the partnership, and paid in discharge of a partnership debt, although their names were not added to the firm, but the trade was carried on by the other partners under the same firm as before, and the executors, when they divided the profit and loss of the trade, carried the same to the account of the infant, and took no part of the profits themselves. [MARTIN, B.—I observe by the schedule, that, amongst the creditors, there are several widows. BRAMWELL, B.—Suppose some of the executing creditors had been trading corporations,—would all their members have been partners in this concern?] That suggests an additional difficulty. Cur. adv. vult.

The court were unable to agree in their judgment, and an attempt was made to obtain a second argument, for which purpose Lord Campbell and Lord Chief Baron Pollock attended: but, the counsel having received no intimation of the wish of the court upon the subject, the proposed re-argument did not take place; and now the judges who heard the case proceeded to deliver their opinions, seriatim, as follows:—

WATSON, B.—This was an action on two bills of exchange drawn upon and accepted by The Stanton Iron Company. The acceptance was in this form,—"For The Stanton Iron Company, per proc. James Haywood."

*550] It appears that Messrs. Smith, of Derby, executed a *trust deed for the benefit of their creditors, on the 13th of November, 1849. This deed was made between the Smiths, of the first part, Francis Sanders, John Thompson, James Haywood, David Wheatcroft, and Samuel Walter Cox, of the second part, and the creditors who executed the deed, of the third part. The deed recited that the Smiths were unable to pay their debts, and had agreed to assign all their estate and effects, subject to the powers and provisions contained in the deed, whereby the Smiths conveyed to the trustees (being the parties of the second part) all their estate real and personal, upon the trusts therein mentioned, viz. to stand possessed of the property, to collect in debts, to carry on the business under the name and style of The Stanton Iron Company, and to sell as they should think fit, to take fresh leases, and to sell iron, to pay interest on mortgages, to call meetings of creditors, the majority in value of the creditors at such meetings to have power to make, alter, add to, or diminish the trusts, or direct that the works should be discontinued, with power to the trustees to compromise debts and to pay creditors, and to pay the residue to Messrs. Smith, and power to appoint new trustees. The deed was to operate as a release of the debts of parties executing.

The defendants executed the deed as creditors. The defendant Cox never acted as trustee. The defendant Wheatcroft, for a short time, acted as trustee, and then resigned, which resignation was accepted

within the provisions of the deed, and thenceforth he ceased to be a trustee.

The question is, whether the defendants, by executing the deed as creditors, and by taking the benefit of the trusts of the deed, became liable as partners on these bills. I am of opinion that they did not, and that the judgment of the Common Pleas should be reversed. There is no decision which has gone the length of determining this point: nor am I aware of any case *before the present in which it has been held, where business is carried on by trustees under an arrangement [*551 deed for the benefit of creditors, that the creditors executing such deed have been held to be liable as partners. Giving full effect to the case of Waugh *v.* Carver, 2 H. Bla. 235, and the cases which have followed that decision, I do not think that they govern the present case; for, the creditors are not absolutely entitled to a proportion of the net profits,—for, if the value of this species of property had risen, the creditors might be paid really out of the stock and existing assets, and the profits might go to the Smiths. And, again, if the trustees were, by direction of the majority of the creditors, to discharge or compound certain debts, such creditors would cease to be partners. The creditors have no certain share of the profits, but only an equitable right to have their debts paid out of the existing assets or the fruits of them, and with no power to deal with or to exercise any dominion over the corpus of the property. It is, in fact, a trust more for the benefit of the Smiths, to enable them better to realize the assets, to pay the creditors in full, and to obtain a surplus for themselves. Would the Smiths be liable as partners? I think not.

The case of Owen *v.* Body, 5 Ad. & E. 28 (E. C. L. R. vol. 31), did not determine this point; and certainly the opinion expressed by the court in that case has not been entirely assented to: per Parke, B., Coates *v.* Wilson, 7 Exch. 205.† I am inclined to assent to the judgment of the Master of the Rolls on this deed, as reported in 25 Law Journ. Ch. 142. But I do not consider it necessary to decide the point; for, my judgment proceeds upon a much narrower point. The action is on bills drawn and accepted in the name of The Stanton Iron Company. What persons constitute and carry on business as The Stanton Iron Company? The deed is express upon that point,—*that *the trustees* [*552 are The Stanton Iron Company; and, as neither of the defendants were trustees at the time the bills were drawn and accepted, I am of opinion the defendants are not liable.

I am glad to be able to arrive at this conclusion, as a contrary decision would put a stop to deeds of this kind, which are highly beneficial to persons in trade; for, creditors to a small amount would never concur in such deeds, when they might be responsible for the whole debts of the concern.

I am therefore of opinion that the judgment should be reversed.

BRAMWELL, B.—In this case the defendants are sued as acceptors of three bills of exchange directed to "The Stanton Iron Company," and accepted "p.p. The Stanton Iron Company, James Haywood;" and the question is, whether they are bound by that acceptance.

Now, I cannot help beginning the consideration of this question by the somewhat trite proposition, that a man charged as acceptor can only properly be so charged in one or more of three ways, viz., that the

acceptance, in terms or by reference binding him, is his very act, or that it was done by his authority, or that he has so conducted himself as to induce persons reasonably to act on one or other of the above assumptions.

In this case, it is not suggested that the acceptance is the very act of the defendants, and, consequently, to my mind, if liable, it must be on one or both the other grounds I have mentioned. But all that the defendants have done, all the authority they can be suggested to have given, any conduct of theirs relied on, or holding out by them, is, by or in reference to and dependent on the deed of arrangement. They have given no other authority than is there contained; they have conducted themselves in no way to give rise to a reasonable belief of such authority, unless in reference to that deed.

*553] *The case against Wheatcroft, is, merely that he signed the deed and attended meetings as any other creditor; and it is conceded that he is no more liable than any other creditor.

Now, it is said that that deed made all the creditors partners, and, *therefore*, every creditor signing it is liable as acceptor of these bills. Whether the deed did or did not constitute a partnership, I think it needless to determine, as I am of opinion that the alleged consequence does not follow. Partners are not liable for the acts of each other on any arbitrary ground independent of principle, as a matter of positive law; but they are liable for a reason; and I know of no reason or principle of law or good sense to make them liable, which does not come under one of the heads I have named. "The law in ordinary partnerships, so far as relates to the power of one partner to bind the other, is a branch of the law of principal and agent:" per Lord Wensleydale, in Ernest, app., Nicholls, resp., 6 House of Lords Cases 401, 417. If a trading partnership is formed, and express authority given to each partner to bind the other, or, even where the ordinary mode of carrying on such trades is, for one partner to bind the other, and there is nothing to the contrary in the agreement between the partners, there authority is given. And, even where there is a prohibition of pledging each other's credit, a man may be bound by the acts of his partner pledging his credit; as, where A. and B. are partners, or appear by their conduct or statements to be so, and A., contrary to the agreement with B., pledges his credit, B. is bound. Why? Because he is not permitted to hold out A. as possessed of an authority, and then deny it to those who have acted on its assumption,—as a shopkeeper would not be permitted to deny that his shopman had the ordinary authority of a

*554] shopman in the particular trade. Again, there is *another way in which a partner may be bound contrary to his agreement or intended agreement with his partners. If A. and B. are partners, and agree that A. shall not pledge B.'s credit, but that he may buy goods for the partnership the property in which on the purchase shall vest in the partnership, and A. does buy goods in his own name; I conceive that the seller may recover the price from A. and B., unless by the bargain he excluded B.'s liability, because in truth the contract of sale was with A. and B., by it the property vests in A. and B., and the proviso that B. shall not be liable is repugnant: and this I conceive to be the way in which may be justified the expression that a participation in profits constitutes a partnership, and so a liability. See per Cresswell, J., in Heyhoe *v.* Burge, 9 C. B. 458 (E. C. L. R. vol. 67)—"It

has been decided in so many cases that an agreement between the parties to be jointly interested in the profits of one transaction constitutes a partnership, and *authorizes them to do all that is necessary to obtain profits*, that" &c. Upon that principle, or on the authorities, independent of principle, it may be these creditors would be liable for goods sold and delivered, to be used in carrying on the business. But how, or on what principle, are they liable on these bills accepted in this way? The arrangement deed does not in terms contemplate a partnership consisting of all the creditors, to be carried on as an ordinary trading partnership, under the style of The Stanton Iron Company. The defendant Wheatcroft has never in any way held himself out as a partner in the concern carried on under the name of The Stanton Iron Company. If, contrary to his intention, he is a partner with the other creditors, by reason of his interest in the profits, he is a partner in a firm consisting of them all, and properly so described, and not properly described as The Stanton Iron Company.

My meaning will be made plain thus,—The Stanton *Iron Company meant the trustees, that is, in the events which have [*555 occurred, Thompson and Haywood, and perhaps Cox. Suppose the deed had not stated what should be the style of the firm, and suppose a bill had been directed "To Messrs. Thompson, Haywood, and Cox, and Haywood had accepted it,—would any ordinary creditor have been liable as acceptor? If so, why? It may be said that the creditors have authorized the use of the style and firm of the Stanton Iron Company: but I say they have not, as representing the whole body of creditors: if they gave any authority for the use of the style (and I do not think they do, it seeming to me that the name is merely referred to to show in what name it will be carried on), it is for its use by the trustees, to designate the trustees. In short, then, if by reason of sharing in the profits the creditors are partners, and as such have given an authority in spite of their intention to the contrary, it is at all events not an authority to bind them by the name and style of The Stanton Iron Company. It is clear, that, to bind a partner, the partnership style must be used: Kirk *v.* Blurton, 9 M. & W. 284.† This point was not taken in the court below. In the judgment, it is said,—"The question is, whether the creditors, by signing this instrument, have made themselves partners." Now, I think this is *a* question, but not *the* question, for the reason I have above given. They then say,—"They (*i. e.* the creditors) agree to carry on the business under the superintendence or agency of a manager." This is not how I read the deed. If the trustees were agents or managers, indisputably the creditors are principals. But I am of opinion they were not so, but were themselves principals, subject to a trust.

I say nothing as to whether the defendants would be liable for goods sold and delivered, or on a bill directed to all the creditors by name, or otherwise, and accepted *accordingly; but, on the ground, as to [*556 Wheatcroft, at least, that the acceptance is not his act, and that he neither expressly nor impliedly nor by necessary implication, or otherwise, authorized it as binding him, and has never conducted himself as though he had, I am of opinion he is not liable, and that the judgment should be reversed.

MARTIN, B.—The facts of this case are very short and simple. In

the year 1849, two gentlemen named Smith, who were partners as iron-merchants at The Stanton Iron Works, in Derbyshire, became insolvent. A deed of composition was executed between them and their creditors. By this deed, they conveyed to five trustees all their property,—upon trust, as to the joint estate, to possess themselves of it, &c.; "*and upon further trust that they the said trustees or trustee, and their or his assigns, did and should continue and carry on, under the name and style of The Stanton Iron Company, the business theretofore carried on by the Messrs. Smith in copartnership as aforesaid.*" The deed then conferred upon the trustees the most extensive powers, and provided, that, out of the gross income of the business, they should pay the rent reserved in a lease under which the Messrs. Smith held the trade premises, and the interest upon certain mortgages, the cost of the composition-deed, and the expenses and losses incurred in carrying on the business, and proceeds thus:—"*And should pay and divide the net income of the said business remaining after answering the purposes aforesaid, unto and among all and singular the creditors of the said Messrs. Smith, and each of them, in rateable proportions according to the amount of their respective debts.*" The deed then contained provisions for calling meetings of the creditors, that the majority in value of the creditors at a meeting should have power to alter the trusts, and *make rules as to the management of the business and the discon-
*557] tinuance of it; and, if they ordered the discontinuance, the trustees were to wind it up, and, after paying all expenses and liabilities, divide the clear residue amongst the creditors rateably, to the amount of their respective debts. The deed then proceeded to make other provisions usual in such instruments, and that, upon the debts being all paid, the residue should belong to the Messrs. Smith. It also provided for the death of one or more of the trustees, and that, in case one or more of them should desire to be discharged from the trust, the continuing trustees or trustee should have power to act: and the deed was to operate as a release to Messrs. Smith by the creditors who executed it.

The two defendants were originally named trustees; but Mr. Wheatcroft resigned within a few weeks of the execution of the deed, and his resignation was duly accepted. He and a considerable number of the creditors signed the deed.

The business was carried on by the acting trustees down to the year 1855, under the name of "The Stanton Iron Company." Towards the end of that year, the plaintiff supplied the company with iron, to the extent of 1400*l.* and upwards, for which he drew three bills, addressed "To The Stanton Iron Company," which were accepted by one of the trustees, thus,—"Per proc. The Stanton Iron Co., James Haywood."

A question which has been argued before us upon these facts, is, whether Wheatcroft be liable upon the acceptances; and, except he be by reason of his execution of the deed, he is not. He had ceased to be a trustee many years before the plaintiff's debt was contracted; and, beyond the execution of the deed, there is no evidence that he has done anything to create a liability. If *he* be liable, all the other creditors
*558] who executed the deed are also liable. The question is, *there-
fore, of great importance. The direct authorities upon it, so far as I am aware, are, a case before the Master of the Rolls,—In re Stan-

ton Iron Company, 21 Beavan 164,—and the case in the Common Pleas which is now appealed against. In the case before the Master of the Rolls, a question arose upon this deed: and in his judgment he is reported to have thus expressed himself,—"It is impossible to hold that the parties to this deed of the third part (the creditors) are partners liable to contribute to the losses which have been sustained by the persons who have been carrying on the business. No such decision has ever yet been made." The judgment of the Court of Common Pleas is reported in 18 C. B. 638, and is very short. The Chief Justice (Jervis) said that the case was expressly bound by Owen *v.* Body, 5 Ad. & E. 28 (E. C. L. R. vol. 31), 6 N. & M. 448 (E. C. L. R. vol. 36), and Janes *v.* Whitbread, 11 C. B. 406 (E. C. L. R. vol. 73). I cannot think that this is so. Owen *v.* Body was a motion arising out of the trial of an interpleader issue. A trader had assigned his property for the benefit of his creditors, and the deed contained a provision that the trustee might carry on the business and pay the expenses, and, as to the surplus, that he should pay it rateably amongst the creditors who should execute the deed, when there was money in hand to the extent of 2*s.* in the pound upon their debts. An execution-creditor disputed the validity of this deed; and the second ground of objection to the deed, upon the argument,—and which seems to me to have been *suggested* by counsel, rather than *argued*,—was, that the creditors who should execute this deed would become partners in the business carried on by the trustee. The judgment of the court, as reported, is this,—"Upon consideration, we think that, upon the second ground of objection, the assignment was not good. The deed imposed such terms as might have constituted a partnership among the parties executing *it; and those were terms to which the creditors were not bound to submit. The assignment was therefore invalid." It is plain that the court did not decide that the creditors, by executing the deed, would become partners, but merely that there was a risk that they might become so, and therefore could not reasonably be required to come in under the deed: and this is the view taken of it by Chief Justice Jervis and Mr. Justice Maule in Janes *v.* Whitbread. The former says,—"The meaning of Owen *v.* Body is, that the deed was one which no creditor could in reason be expected to execute." And Mr. Justice Maule says: "The judgment meant no more than that the deed was not such a one as it was reasonable to expect a creditor willing to take his fair share of the property to accede to." In Janes *v.* Whitbread, there was a provision in the deed that the insolvent trader might be employed by the trustee in carrying on the trade, if thought expedient; and the judgment was, that this provision did not bring the deed within the view taken by the Court of Queen's Bench in Owen *v.* Body, and did not vitiate it. It seems to me, therefore, that, if these be the only authorities, the Master of the Rolls was well warranted in saying that no decision had ever yet been made, that creditors executing a composition-deed which contained a provision that the trustees should carry on the business, were partners.

[*559

As I have already observed, the deed alone creates the liability, if there be one: and the most material question seems to me to be, who are "The Stanton Iron Company?" The bills are drawn upon The Stanton Iron Company, and accepted on behalf of The Stanton Iron Company. In my opinion, the trustees, and they alone, are this com-

pany. The provision in the deed is, that "*The trustees or trustee, or their or his assigns, should continue and carry on the business under* *560] *the *name or style of The Stanton Iron Company.*" The whole of the then existing property of the Messrs. Smith was conveyed to them, and any goods or merchandise purchased by The Stanton Iron Company would in my opinion belong to them: otherwise this strange anomaly would exist, that the property originally assigned would be theirs, but the subsequently acquired property not. I therefore think the iron-stone bought from the plaintiff, for the price of which the bills were given, was their property, and that the defendant Wheatcroft, or any other individual creditor who meddled with it, might have been treated by them as a trespasser. The creditors had no individual powers whatever. Their collective power could only be exercised at a public meeting, and, except called by the trustees themselves, one could only be called at the request in writing of two or more creditors whose debts amounted to 8000*l.* There was, therefore, no authority in any individual creditor to control the business of the company, and, so far as concerned the iron ore sold by the plaintiff, which was the consideration for the bills, the only interest the creditors had in it, was, that, after it had been manufactured and the price of it brought into the general account, and after the plaintiff had been paid the price of it, if there was a net profit upon the whole business, they were to have it distributed amongst them rateably according to their debts.

But, as I have already observed, I think the question depends upon who are The Stanton Iron Company; and, in my judgment, they are the trustees, and the trustees alone; and, if so, none other is liable upon these acceptances. The acceptance of a bill by a firm must be in the name of the firm, and bind the firm only: Faith *v.* Richmond, 11 Ad. & E. 333 (E. C. L. R. vol. 39); Kirk *v.* Blurton, 2 M. & W. 284.†

The effect and operation of the acceptance of a bill, and the execution *561] of a deed under seal, are very *analogous. It seems to me, that, by the very words of the deed, the trustees, and not the creditors, are The Stanton Iron Company. The trustees were not necessarily creditors; and, if they had happened not to have been, and the contention on the part of the plaintiff be right, the trustees would not be liable upon the acceptances at all, for under such circumstances, there could be no partnership nor joint interest between them and the creditors: and I apprehend it is clear that two separate and distinct parties in interest cannot be liable upon one and the same acceptance to a bill.

This may be said to be a narrow and technical view of the question: but I go further; I concur with the Master of the Rolls in thinking that the creditors are not partners in the sense attributed to them in the judgment of the Court of Common Pleas. To hold them to be so, would, in my opinion, be contrary to the whole spirit and object and intention of the deed. No one can suppose that a creditor,—say, to the amount of 20*l.*, and it might be for a lesser sum,—by executing this deed, and agreeing to receive payment of his debt out of the net profits, intended to render himself liable to an unlimited extent by acceptances of the trustees, which might possibly lead to his utter ruin. I am aware it has been said that the Master of the Rolls was only dealing with the rights of the parties to this deed, inter se; but it seems plain to me that he meant to express himself to the effect that there was no partnership amongst

the creditors at all: and in this opinion I concur. As against third parties, a partner can withdraw from a partnership at his pleasure. It is difficult to see how a creditor could withdraw from his liability (if there be one) under this deed. I am not at all unconscious of the difficulty arising from the circumstance that judges of great eminence have frequently expressed themselves to the effect that a joint interest in profit *constitutes a partnership. As to the *decisions* in the cases in which these expressions occur, they seem to me to be correct. I [*562 do not feel inclined to differ or dissent from any of them: but, to the general abstract proposition, that a man is liable as a partner because it can be made out that he has some remote and perhaps infinitesimally small interest in the profits of a business or transaction, wholly independent of all other circumstances and considerations, I am not prepared to assert. It has been decided that a person who shares in the gross profits of a trade, is not a partner: Pott *v.* Eyton, 3 C. B. 32 (E. C. L. R. vol. 54). Baron Parke also is reported to have stated this to be the law, in summing up the case of Heyhoe *v.* Burge, 9 C. B. 440 (E. C. L. R. vol. 67). For my own part, I am unable to comprehend why a man is a partner if he share in the *net* profits, but is not a partner if he share in the *gross*. In the same case, the learned Baron is reported to have said "that a person who shares net profits is primâ facie to be considered a partner." My impression is, that this is the correct rule of law upon the subject. In the case of Heyhoe *v.* Burge, the jury found that the defendant had entered into a contract whereby he became entitled to one-fourth of the clear or net profits of a transaction: but Baron Parke did not state the law to be, that this, without anything more, made him a partner; and I collect that the Court of Common Pleas entertained the same view; for, the following passage occurs in the judgment in banc,—"The argument turned so much on the question whether the instrument alone (viz. that giving to the defendant one-fourth of the net profits) was sufficient to constitute a partnership, that we thought there must be some misapprehension as to the meaning of the learned Baron's report. We have, therefore, referred to him, and find that he intended to report that which he apparently did report, viz. that he had left the question to the jury *on the whole of the evidence,—not leaving it that that instrument [*563 constituted a partnership: on the contrary, he said it would not." And it seems to me that that is a distinct authority of Baron Parke and the Court of Common Pleas, that *merely* taking a share of the net profits does not constitute a partnership. A statement of opinion or dictum of Lord Chief Justice De Grey, in Grace *v.* Smith, 2 Sir W. Bla. 998, is one of the earliest usually cited upon this subject. He says, "If one takes part of the profit, he takes a part of the fund on which the creditor of the trader relies for his payment." In Waugh *v.* Carver, 2 H. Bla. 235, Lord Chief Justice Eyre says: "Upon the authority of Grace *v.* Smith, he who takes a moiety of all the profits indefinitely, shall by operation of law be liable for the losses,—upon the principle, that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." The same reason for the rule is given by Lord Chief Justice Tindal, in Pott *v.* Eyton, 3 C. B. 32 (E. C. L. R. vol. 54).

It is to be observed that this reason is quite inapplicable to, and has no bearing upon, the present case; for, the creditors of Messrs. Smith

were not entitled under the composition deed to one farthing until all the creditors of The Stanton Iron Company, including the plaintiff, were paid their demands.

With my view of the true legal ground for the present decision, it would be out of place here to pursue the subject further. I would merely observe that the well established non-liability of the master and seamen of whaling ships, who are paid according to the profits, seems inconsistent with the abstract rule which I have mentioned. I think it is no answer to say that it is a mode of remunerating services. In very many partnerships, all that a partner brings into the concern, is, his intellect, his know-
*564] ledge, his experience, and his *energy and industry,—a contribution to the common interest, it may be, more valuable than any money capital, however large.

For these reasons, I think the plaintiff has failed to establish the liability of the defendant Wheatcroft; and, the contract alleged being a joint one, that the judgment below for the plaintiff ought to be reversed.

COLERIDGE, J.—My brothers Erle and Crompton concur in the opinion I am about to read.

This was an appeal from a judgment of the Court of Common Pleas on a rule to enter the verdict for the plaintiff: and I am of opinion, upon consideration, that their decision ought to be affirmed,—speaking, however with unfeigned distrust of my judgment, in the divided state of the court.

The facts of the case are stated very fully in the Common Bench Reports, Vol. 18, p. 617, and need not be now repeated here. Two questions were raised upon them in the argument before us,—the first, whether, under the deed, by which two persons of the name of Smith conveyed all their property to trustees for the benefit of creditors executing the deed, the defendants, who were among such creditors, were partners in the concern carried on by the trustees under the provisions of the deed,—and, secondly, if they were so, whether they were liable as acceptors of the bills of exchange on which the present action is brought, the acceptances being by "The Stanton Iron Company," and that being the name under which, in compliance with the stipulations of the deed, the trustees carried on the concern, and had accepted the bills in payment of goods supplied to it.

According to the provisions of the deed, the trustees are not simply to wind up the concern, but to carry it on indefinitely, under the name of
*565] "The Stanton Iron *Company;" and all necessary powers for this purpose are conferred on them. They may procure new leases of the premises,—erect new works,—purchase new machinery, implements, live and dead stock,—employ managers, &c. They are to divide the net income arising from the business so carried on rateably among the creditors: and, after the satisfaction of all these, there is an ultimate trust for the Messrs. Smith, their executors and assigns.

It appears to me, that, although the primary object of the trust is undoubtedly the payment of the creditors, yet the deed is very distinguishable from an ordinary winding-up deed. In such a deed, powers to trade temporarily, and carry on the business, might properly be given as ancillary to the main objects,—the collecting in of debts, disposing of the stock, and winding up the concern. But, under this deed, a trading concern is created, from the profits of which the debts are to be paid:

and it is quite consistent with the provisions of it, that the concern may never be wound up, but, when the profits have paid off the creditors, the whole may be restored again in full activity to the Messrs. Smith, for whom meantime the trustees are substituted in the management. But, further, in the discharge of their duty, the deed places the trustees under the control of the general body of creditors, who may alter the trusts and provisions of the deed at their pleasure.

This being the nature of the deed, it seems to me perfectly clear that the trustees, if they stood alone, would form a trading partnership; and, as they do not stand alone, but are representatives and agents of the creditors generally, and as these last are intended to share in the net profits of the concern, up to the extent of their several claims on the Messrs. Smith, it is equally clear, and stands on the most undoubted law, as it seems to me, that these last are partners as against third *persons, and liable as such to those who supply the money or the goods by means of which the trade is carried on and the profits earned. [*566

This principle of law was applied by the Court of Queen's Bench, in Owen *v.* Body, 5 Ad. & E. 28 (E. C. L. R. vol. 31), 6 N. & M. 448 (E. C. L. R. vol. 36), to a deed not so strong as the present, and recognised by the Court of Common Pleas, in Janes *v.* Whitbread, 11 C. B. 406: nor was the principle itself disputed in the argument before us; but it was said not to be applicable to a case where the net income was shared only for the purpose *of liquidating old debts*. This seems to me, as regards third parties, an immaterial distinction: if creditors take into their own hands the concern of their debtor, and carry it on with a view to profit, they are as much receiving the profits of that concern when they apply them to wipe off their outstanding claims, as if, no such existing, they had purchased the concern from a solvent trader; and they ought to be equally responsible to the parties from whom they procure goods, or whom they employ for the purpose of making those profits. Nor can it be said that the trustees in this case are the trustees of the Smiths only, that they carry on the business for them only, and that the creditors are in the light only of persons who have advanced money to the concern for the purpose of carrying it on, and who are to be repaid from the concern, but have no interest in the rising or falling of the returns.

This was the view taken of this deed, certainly, by the Master of the Rolls, in re Stanton Iron Company, 25 Law Journ. Ch. 142: but with all the respect which I entertain for that learned judge, I am unable to agree with it. The trustees seem to me manifestly the representatives of the creditors: they act for them, and under their control; and the trust for the Messrs. Smith is not concurrent with or over-riding that for the creditors, but arises only when the trusts for the creditors *are entirely satisfied,—at which time the control also of the creditors will cease, and a new state of things begin. [*567

If the body of creditors had been small, so that they could have carried on the concern themselves without the intervention of any trustees, and they had done so, the case would have been substantially the same as now,—but, could any one of them then have denied, in respect of a person with whom the Stanton Iron Company dealt, that he was a partner in the concern, because he was only getting back his debt, and because the Messrs. Smith were to come in again when the whole debt was recouped?

The second question seems to me involved in the first. The question is, who are The Stanton Iron Company? If the trustees do but represent the creditors, that is, manage the concern for them, and hand over to them the profits, then, as against those with whom they deal, the creditors are the company. It does not follow, that, inter se, and for all purposes, they are so, or that the trustees can bind them by the use of the name for purposes foreign to those for which they are authorized to act; but this is a limitation common to all partnerships, and incident to the principle of agency and authority, on which all partnership liability depends.

The conclusion to which I come will not produce any of the inconvenient consequences dwelt on in the argument; for, the clauses in the deed on which I rely are by no means necessary to the formation of a perfect deed of assignment for the purpose for which deeds of this kind are usually framed; and, if it were, that is to say, if all assignments of trading concerns for the benefit of creditors necessarily involved an indefinite carrying on of them, it would be still more inconvenient, because more unjust, that the new creditors *should not be able to have recourse for satisfaction of their debts to those whom they supply with goods, and who reap profit from the use of the goods so supplied. *568]

For these reasons, I think the judgment ought to be affirmed.

The court of appeal being thus equally divided in opinion, the appeal failed, and the judgment of the Court of Common Pleas so far remained undisturbed.

Bovill, Q. C., inquired whether the court would give any direction as to the costs.

COLERIDGE, J.—We certainly should not think of giving costs.

Some discussion then ensued with reference to a case of Blackwell v. Wheatcroft, which was an action for *goods sold and delivered* to The Stanton Iron Company, and in which the Court of Queen's Bench had decided in accordance with the view taken by the Court of Common Pleas, and the case had stood over to await the decision in Hickman v. Cox; whereupon Martin, B., observed,—"Before you agree to be bound in that case by the decision of this, you had better consider whether an entirely different question is not raised there. I considered the matter a good deal, and I thought that case had no bearing on this. It raises a totally different question."

The principal case now stands for argument in the House of Lords.

The reporter has been informed that the question whether, under the circumstances, an appeal to the *House of Lords was warranted by the statute (17 & 18 Vict. c. 125, ss. 84, 85), was discussed before Bramwell, B., at Chambers, and that the learned Baron, after full deliberation, decided that it was. See Levy v. Green, 30 Law Times 241, where it was held by the Court of Queen's Bench that there is a right of appeal under these sections, if, upon a motion to enter a nonsuit or verdict, or for a new trial, the rule drops in consequence of the judges being equally divided in opinion,—the failure of the appeal being considered, upon a liberal construction of the statute, to be equivalent to the rule being *discharged*. *569]

JOHNSON *v.* GOSLETT, HOLGATE, JOHNS, KINGCHURCH, PETER, WILLINGALE, and WEATHERLEY. *Nov.* 28.

Seven individuals associated themselves together for the formation and working of a mine upon the cost-book principle, and issued a prospectus describing the company as having a capital of 12,000*l.*, in 12,000 shares of 1*l.* each, to be paid upon allotment; and setting forth the usual reports of the mining captain that the mine was in full operation, and stating that the money was to be paid to Messrs. L. & Co., the bankers of the company. The plaintiff applied for and obtained an allotment of fifty shares, and paid 50*l.* to L. & Co., who gave him a receipt describing that sum as having been received by them for *the company*. The plaintiff, having afterwards discovered that not more than 1435 shares had ever been subscribed for or paid upon, brought an action against the directors to recover back his deposit, on the ground of failure of consideration:—Held,—affirming the judgment of the Court of Common Pleas,—that *all* the directors were liable, notwithstanding the account at the bankers' was kept *in the names of five of them only*.

THIS was an appeal by all the above-named defendants except Johns, under the provisions of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), against the decision of the Court of Common Pleas discharging a rule whereby it was ordered that the plaintiff should show cause why the verdict found for him on the trial of this cause should not be set aside, and instead thereof a verdict be entered for the defendants, on the ground, that, in the case of a cost-book *company, the plaintiff is not entitled to recover the price of his shares, or his [*570 deposit, notwithstanding all the shares have not been subscribed for; and on the ground that there was no evidence against two of the defendants, Willingale and Weatherley: see 18 C. B. 728.

The case stated for the opinion of the court of error, was in substance as follows:—

The action was brought to recover 50*l.* for money alleged to have been received by the defendants for the plaintiff's use, being the amount alleged to have been paid by the plaintiff to the defendants on the allotment to him of fifty shares in the Perran Wheal Alfred Copper and Lead Mining Company. The defendant Henry Johns did not appear, and the plaintiff signed judgment against him by default pursuant to the 38d section of the Common Law Procedure Act, 1852. The other defendants appeared, and pleaded never indebted, on which issue was joined.

The cause was tried before Jervis, C. J., at the sittings in London after Hilary Term, 1856, when the jury found a verdict for the plaintiff for 50*l.*, under the direction of the learned judge, who reserved the points upon which the said rule to show cause was afterwards granted, as aforesaid.

The following evidence was given at the trial:—

The plaintiff produced a prospectus, and proved that it was published and issued by the authority of all the defending defendants. This prospectus was read in evidence, and was as follows:—

"Perran Wheal Alfred Copper and Lead Mine,

"Perranzabuloe, Cornwall.

"Held under lease for twenty-one years, at a royalty of 1/18th.

"Capital 12,000*l.*, in 12,000 shares of 1*l.* each; to be paid on allotment.

"*To be conducted on the cost-book principle.*

*571] *"*Directors and managing committee.*

"William Goslett, Esq., 32 South Molton Street, Oxford Street.

"William Holgate, Esq., Staines, Middlesex.

"Henry Johns, Esq., 68 Upper Thames Street.

"Samuel Kingchurch, Esq., 7 Alfred Place, Bedford Square.

"John Peter, Esq., 31 Great St. Helen's.

"*Thomas Willingale*, Esq., Phœnix Wharf, Wapping.

"*Samuel Weatherley*, Esq., New Cross.

"*Bankers.*

"Sir J. W. Lubbock, Bart., Foster & Co., 11 Mansion House St., London.

"*Brokers.*

"George Batters, Esq., 26 Throgmorton Street, London.

"William Froom, Esq., 27 Change Alley, Cornhill.

"*Solicitor.*

"Chester Cheston, Esq., 1 Winchester Buildings, Old Broad Street, City.

"*Managing Agent.*

"Captain John Davies, St. Agnes.

"*Secretary.*

"Mr. William Battye.

"Offices, 33 Great Winchester Street.

"Prospectus.

"This company is formed for the purpose of working the Perran Wheal Alfred Copper and Lead Mine, in the parish of Perranzabuloe, in the county of Cornwall. This extensive sett is situate about three-quarters of a mile south of the Great Perran St. George Mine, so celebrated for the production of copper; the cross courses of which run into and pass through this mine.

"The strata is a light blue killas highly mineralized, and very congenial to mineral deposits; and several *champion lodes of great promise are known to be within its boundaries. *572]

"Operations in this mine were commenced by a company about forty-two years ago; and a cross-cut adit or drift extended upwards of 150 fathoms, for the purpose of intersecting and draining the lodes. The first lode thus intersected was driven on for several fathoms, and, although only a few fathoms deep, produced several tons of rich copper ore: but the parties, having very limited means at their command, were unable to erect suitable machinery for properly developing its resources; and ultimately they abandoned the mine.

"Other important discoveries have since been made in driving the adit: two copper lodes south of the shaft, called The Wheal Prosper lodes, were cut and driven through, and show excellent copper. A lead lode also further south has been cut, and excellent silver lead broken therefrom.

"The present proprietors took possession, and commenced working on the 1st of January, 1853, under lease from Sir R. Vyvyan, Bart., for twenty-one years from December last, at the moderate royalty of 1 | 18th; and since that period have built most substantially an engine-house, boiler-house, stack, &c., and procured from Messrs. Sandys, Vyvyan & Co. a new 30-inch cylinder steam-engine, which was set to

work on the 26th of February last, and is of ample power for efficiently working the mine.

"The engine-shaft is now being sunk on the course of the lode, by nine men, at 8*l.* per fathom. The lode is about four feet wide, and of great promise, being composed of beautiful friable quartz, prian, iron pyrites, blende, and copper ore. It has a declination southward of sixteen inches in the fathom, and will form a general junction with the two other champion lodes seen in the adit south of the shaft, at about thirty fathoms below the present bottom, which can be reached at a [*573 *moderate expense: and there is no doubt that at this junction very large deposits of ore will be found.

"The directors have agreed with the proprietors for the purchase of this mine, and all the machinery and works thereon, clear of all costs up to 31st of March; and the proprietors have agreed to take shares for the full amount of their interest in the mine, and have further agreed that one-fourth of such shares shall remain in the hands of the directors until the mine shall have been brought into a dividend-paying state.

"Applications for shares to be made to the secretary, at the office of the company, where specimens of the ore may be seen, and at the brokers'.

"Reports.

"'Perran Wheal Alfred, 19th March, 1853.

"'I have great pleasure in informing you, that, since resuming the sinking of the shaft, the copper-lode has considerably improved, and that there is every prospect of getting into a good course of ore in a few fathoms' sinking. The lode in the bottom of the shaft is four feet wide, and well defined; and, although only ten fathoms from 'grass,' is orey throughout; and I believe that every stone broken from the lode produces copper-ore; indeed, I never saw better indications so near the surface, nor prospects more cheering.

"'The next copper lode south of the shaft is only nine feet distant, and is evidently throwing off its branches and mineralizing the strata dividing the two lodes. On sinking five or six fathoms deeper, we shall cross cut to this lode, to ascertain which is the most productive.

"'The lead lode is also of great promise; and, to convince you of its productiveness, we employed two men on Thursday last to sink on it under adit. Samples of the ore I hope to send you on Wednesday: but nothing more can be done on this lode advantageously till rods and pump-work are connected to the engine.

(Signed) "'JOHN DAVIES.'

*"Extract from report of Captain W. Hooper. [*574

"'I beg to transmit to you the following report of the above mine, which I have carefully inspected. The locality in which the mine is situate is of established reputation for mining, being in the vicinity of Perran Wheal George, Wheal Leisure, and other mines, which have all paid large dividends, and having its lode parallel with theirs: and, as far as surface appearances can be held to be indicative of a mine's merits, everything in the present instance is of a decidedly favourable character, while the underground indications are so promising as to convince every practical miner that this mine will realize the most sanguine expectations.

"'The lodes vary from three to five feet wide, composed principally of a beautiful quartz, for the most part compact, but in a lesser degree

porous and friable, containing a number of crystalline fissures studded with rich cubes of sulphurate of copper: and the lode altogether is so thickly impregnated with these ores as to make it extremely difficult to break a stone not bearing a portion of them. The lodes also carry mundic, sulphurate of zinc, chlorite, &c. The gozzan is rich and congenial, bearing beautiful stones of copper-ores.

"'One very important feature,—perhaps the most important,—is, the contiguity of three copper lodes, which, according to their ascertained underlie at the adit level, will form a junction at about thirty fathoms under the adit.

"'The continuous and effectual prosecution of the engine-shaft to this level will without doubt speedily place this mine in that position of value which its present appearances and discoveries so strongly indicate.

"'To the south of these lodes is a silver lead lode, traversing the sett, from which various quantities of silver-lead have been raised. The gozzan on this lode is very fine, and the country around it characteristi-
*575] cally congenial for large deposits of this mineral. *Accompanying this lode is a beautiful flookan one foot wide. By a run of flat rods from the engine, this lode could be well tried, and in all probability would yield profitable returns: and I have no hesitation in stating, that, when properly developed, Perran Wheal Alfred will prove a permanent and valuable undertaking.

(Signed) "'W. Hooper.'"

It was proved that the directors and managing committee named in the above prospectus were the defendants.

It was also proved that the plaintiff applied for shares about the 21st of April, 1853, through seeing the prospectus, by a letter bearing that date, and signed by him, which was put in, and of which the following is a copy:—

"To the committee of management of the Perran Wheal Alfred Copper and Lead Mining Company.

"Gentlemen,—be pleased to allot me one hundred shares in this company: and I undertake to accept the same, or any less number you may allot me, according to the rules and regulations of the cost-book, and to pay the deposit thereon."

Fifty shares in the company were allotted to the plaintiff. The plaintiff paid 50*l*., being the deposit on the said fifty shares, to Sir J. W. Lubbock & Co., the bankers mentioned in the prospectus, and received from them a receipt, of which the following is a copy:—"Perran Wheal Alfred Copper and Lead Mining Company. Bankers' receipt No. 27. London, May 3d, 1853. Received, on account of the *above company*, fifty pounds. Sir John William Lubbock & Co. T. Harding. This receipt will be exchanged for certificates at the company's office, of which due notice will be given."

Two or three months afterwards, the plaintiff exchanged the said bankers' receipt for certificates signed by the secretary named in the above prospectus, and by the defendants Goslett and Kingchurch, which
*576] were put *in and read. They were in the following form, changing the numbers only:—

"The Perran Wheal Alfred Copper and Lead Mining Company,
"Perranzabuloe, Cornwall.
"*Conducted on the cost-book principle.*

"In 12,000 parts or shares, of 1*l.* each.
"No. 6671 to 6680.

"The holder of this certificate [blank left for name] is entitled to ten parts or shares in the above company, *to be held subject to the rules and regulations of the said company.*

"W. GOSLETT
"S. KINGCHURCH } Directors.

"W. BATTYE, Sec.

"N. B. The holder of this certificate may at any time require the above shares to be registered in his name in the cost-book, at the office of the company."

Not more than 1435 *shares in the said company had ever been subscribed for or paid upon before or after the company commenced business.*

At a meeting of shareholders held on the 5th of April, 1854, at which the plaintiff was not present, a resolution was carried, to dissolve the company.

The plaintiff received a letter signed by William Battye, secretary to the company, of which the following is a copy, on or about the date thereof:—

"Gt. Winchester St. 24th August, 1854.
"Perran Wheal Alfred.

"Sir,—I beg to inform you that a special meeting of shareholders in the above mine will be held here on Monday, the 4th of September, at 1 o'clock, for the purpose of considering the propriety of selling the mine, machinery, &c., and to make an order for the sale, and for the appropriation of the money."

*A special meeting was held in pursuance of the above notice (but not attended by the plaintiff), at which a resolution was passed to sell the mine, machinery, &c.; and which were afterwards accordingly sold. [*577

The plaintiff called William Battye as a witness, who stated that he was the secretary to the said company: and, on cross-examination, he stated that he was acquainted with cost-book mines; *that it was usual to begin with less than the capital paid up; and that they sometimes began with a very small part of the capital.* On his re-examination, he stated, that he had been concerned in twenty or thirty cost-book mines; *that they always told subscribers that the capital was not paid up, when they began working:* and, on further cross-examination, the witness stated *that they frequently began working with part of the capital, without notice to the subscribers.* This witness also proved that meetings of the directors of the company were held on the 18th of April, 1853, and on the 2d of May, 12th of May, 26th of May, and 9th of June following; and that the directors present, and the proceedings at such meetings, were correctly entered in the minute-book, which was put in and read, and was as follows:—

"At a meeting of directors of Perran Wheal Alfred Mine, held at the offices of the company, No. 33, Great Winchester Street, on Monday, the 18th of April, 1853, present, Messrs. William Holgate, Henry Johns, C. Chester, John Peter, *S. Weatherley*, S. Kingchurch, William Goslett,—

"The minutes of the last meeting held 4th April, were read.

"Resolved,—that the prospectus be inserted in the 'Times' and

'Daily News' three times, and in the 'Leeds Mercury' and 'Hull Advertiser' twice.

"That the salary of Captain Davies be six guineas per month, commencing 1st April."

*578] *"At a meeting of directors of Perran Wheal Alfred Mine, held at the office, No. 33, Great Winchester Street, on Monday, 2d of May, 1853, present, Messrs. John Peter, S. Kingchurch, William Holgate, George Batters, and William Froom,—

"The minutes of the last meeting, held 18th of April, were read and confirmed.

"The brokers, Messrs. Batters and Froom, were instructed to make a market for the shares, and purchase shares for that purpose."

"At a meeting of directors of Perran Wheal Alfred Mine, held at the office of the company, No. 33, Great Winchester Street, on Thursday, 12th May, 1853, present, H. Goslett, S. Kingchurch,

"The cost-sheet was produced, amounting to 97*l.* 9*s.* 8*d.*, for labour cost, and 45*l.* 18*s.* for merchants' bills; when it was ordered that checks be drawn for the amounts.

"A check was ordered to be drawn for 7*l.* 4*s.*, for the secretary's salary and petty-cash. (Signed) HENRY JOHNS."

"At a meeting of directors of Perran Wheal Alfred Mine, held at the office of the company, No. 33, Great Winchester Street, on Thursday, the 26th of May, 1853, present, Henry Johns, in the chair, John Peter, *S. Weatherley*, S. Kingchurch, W. Goslett,

"The minutes of the last meeting were read and confirmed.

"The secretary reported that *Mr. Willingale* has *sold his interest in the mine, and therefore ceased to be a director.*

"Captain Davies's report was read, and received with much satisfaction.

"The secretary was instructed to prepare a form of scrip-certificate.

*579] *"The following accounts were presented for payment, when checks were ordered to be drawn for the same,—Baily, Brothers, for advertising, 76*l.* 13*s.* 4*d.*; W. Mitchell, do. 20*l.* A checks was also drawn, amounting to 15*l.* for the deputation expenses. (Signed) JOHN PETER."

"At a meeting of directors of Perran Wheal Alfred Mine, held at the office of the company, No. 33, Great Winchester Street, on Thursday, the 9th of June, 1853, present, John Peter, W. Goslett, S. Kingchurch,

"The bankers' book was produced, showing a balance in favour of the mine of 465*l.* 14*s.*

"The cost-sheet was produced, amounting to 63*l.* 6*s.* 8*d.* for labour cost, and 23*l.* 18*s.* 11*d.* for merchants' bills. Order, that check be drawn for the same.

"The secretary laid before the meeting a form of scrip-certificate for shares. The same was approved, and ordered to be printed as follows:—

"1000	5*l.*	5000*l.*
"350	10*l.*	3500*l.*
"175	20*l.*	3500*l.*
		"£12,000

"W. GOSLETT."

The plaintiff also called as a witness one Thomas Harding, who proved that he was clerk to Messrs. Lubbock & Co., the bankers, and that the banking account kept by the company with Messrs. Lubbock & Co. had been and was kept in the names only of the defendants Kingchurch, Goslett, Johns, Peter, and Holgate.

The cost-book of the company was also given in evidence, containing the rules and regulations of the company, which rules and regulations were headed,—"Rules and Regulations of the Perran Wheal Alfred Mining Company, formed or established 22d March, *1853." The more material of these rules were as follows:— [*580

"1. The several persons whose names are for the time being entered as shareholders in the cost-book shall be partners or shareholders in a mining company formed or established for the purpose of opening and working certain mines now called or known by the name of Perran Wheal Alfred Copper and Lead Mines, in the parish of Perranzabuloe, in the county of Cornwall, and all other metals upon or under certain lands known by the name of Perran Wheal Alfred, in the parish of Perranzabuloe, in the county of Cornwall, which are held for a term of twenty-one years from the ——— day of ———, 1853, under a lease granted by ——— to ———, as trustees for the company, and for converting, manufacturing, selling, and disposing of the produce of such mines.

"2. The name or style of the said company shall be The Perran Wheal Alfred Mining Company.

"3. The places of business of the said company shall be at the works at Perranzabuloe, at the offices of the company, No. 33, Great Winchester Street, Old Broad Street, London, or at such other place as for the time being may be the offices of the said company in London.

"4. The capital of the said company shall be 12,000*l.*, which shall be divided into 12,000 parts or shares of 1*l.* each, of which 6000 shall be allotted and vested to and in favour of the former proprietors of the mine, as and for their interest therein.

"5. The trustees of the said lease shall when and if required by the directors, execute a deed declaring that they hold the said mines under and by virtue of such lease as trustees for the benefit of the shareholders in the said company, according to their respective shares and interests therein: and, if any or either of the said trustees, or any future trustees, shall resign or die, or *become incapable or unwilling to act, then new trustees or a new trustee may be appointed by any of the general meetings of shareholders hereinafter provided for, in the place of the trustees or trustee so resigning or dying, or becoming incapable or unwilling to act as aforesaid; and the said premises shall be forthwith assigned and vested in the said new trustees or trustee jointly with the continuing trustee or trustees, or in such new trustees only, as the case may require, at the expense of the said company. [*581

"6. The said company is formed, and the business thereof shall be conducted and carried on, on the cost-book principle; subject, nevertheless, to such provisions as are hereinafter contained.

"7. Mr. William Battye, of No. 33, Great Winchester Street, Old Broad Street, London, shall be the secretary and purser of the said company, subject, nevertheless, to the control of the managing committee or directors, or of the shareholders of the said company.

"8. A committee of managers, consisting of members hereinafter called directors, shall be appointed; and William Goslett, William Holgate, Henry Johns, Samuel Kingchurch, John Peter, *Thomas Willingale*, and *Samuel Wetherley*, shall be *the present directors of the said company;* and the said ———— shall be the chairman of the said directors at their first meeting: and, at every succeeding meeting, every other director shall in turn or rotation, according to the order in which his name stands in the before-mentioned list (as the case may be), be and act as chairman: and, if at any meeting the director next in rotation should not be present, then such one of the directors as would be next in rotation if all the preceding directors had served the office of chairman, shall be and act as the chairman of such meeting.

*582] "9. No person shall be capable of being a director *unless he shall hold and continue to hold during his directorship one hundred shares in the said company. The certificates thereof shall be deposited with and remain in the possession of the company: and, in case any director shall cease to hold the said number of shares in the said company, or shall take the certificates thereof out of the possession of the said company, he shall be deemed to have resigned his office as a director from the time of his so ceasing to hold the said number of shares, or of his taking the certificates out of the possession of the said company, and a new director may be appointed in his place, as hereinafter mentioned.

"10. In order to constitute a board of directors, there shall be three directors at the least present.

"11. The said ———— shall be the trustees of the said company, and C. Cheston, of, &c., shall be the attorney and solicitor of the said company.

"12. Messrs. J. W. Lubbock, Bart., & Co., for the time being, shall be the bankers of the said company; but the directors may from time to time, as and when they shall in their absolute discretion think proper, change the bankers of the said company.

"13. The directors shall meet once a month, or oftener if they shall think fit and proper, for the purpose of superintending the affairs and concerns of the said company: and they shall have full power at any meeting or meetings to adopt any resolution they may think necessary for the benefit of the said company: and the purser and other officers of the said company shall be subject to their discretion and control, and shall be liable to be removed from the offices which they may hold in the said company, at the discretion of the directors, who may appoint other persons to supply the places of those who may be so removed, or may have resigned.

*583] "14. At every meeting of the directors, the chairman *to be appointed as hereinbefore mentioned shall preside; and all questions considered at every such meeting shall be determined by a majority of votes, each member having one vote: and, in case of an equality of votes, the chairman shall have a casting vote.

"15. A general meeting of shareholders shall be held in the month of ———— in every year; and the secretary shall convene such meeting by giving seven days notice at least of such meeting to every shareholder, by letter addressed to him or her according to his or her description and residence in the cost-book; which letters may be sent by post or

delivered at his or her residence. The present directors shall remain in office until the ordinary meeting of shareholders of the company, to be held in the month of ————, 1853; and, at such meeting, the shareholders present personally or by proxy may either continue in office the before-mentioned directors, or any number of them, or may elect fresh directors to supply the place of those not continued in office; the present members of the board of directors being eligible. And, at every ordinary general meeting to be held in the month of ———— in every year thereafter, the shareholders present personally or by proxy shall elect directors for the ensuing year. And, at every meeting of the shareholders of the company, the director who was chairman at the last meeting of the directors, or, in his absence, some one of the directors, or, in the absence of all the directors, any shareholder to be chosen as hereinafter mentioned, shall be chairman of such meeting: and, in either of such last-mentioned cases, such chairman shall be appointed by a majority of the votes of the shareholders present at such meeting.

"16. The present directors shall, from and after the ———— day of ————, 185 , be entitled to retain out of the funds of the said company at and after the *rate of —— per annum, to be divided amongst those directors who have attended meetings, and in pro- [*584 portion to the number of their attendances respectively, as a remuneration for their services,—the chairman of each meeting receiving for the meeting of which he was chairman a remuneration double of that received by the other directors.

"17. All the directors, trustees, and other officers of the company shall be kept indemnified by the said company from and against all the losses, damages, and expenses which may be incurred in relation to the management or concerns of the said company, except the same losses, damages, and expenses may have been sustained or incurred by the wilful default or neglect of the parties sustaining or incurring the same,

"19. *All payments due from shareholders shall be made to the bankers for the time being of the said company* in London; and all moneys and securities for money belonging to the said company shall be paid into or deposited in the hands of the said bankers, *to the account of the directors of the said company for the time being;* and all payments for and on behalf of the said company exceeding 5*l.* shall be paid by check on such bankers; and all checks for money shall be signed by at least two directors, and countersigned by the secretary; and no such checks shall be signed, except at a meeting of directors.

"20. In case of the resignation or death of any director, or if he or she shall cease to hold 100 shares in the said company, or shall not deposit the certificates thereof with the said company, or, having so deposited them, shall take them out of the possession of the said company, contrary to the provisions of rule 9, the vacancy so occasioned may be filled up by the other directors, by the election of a new member as a director.

"21. The board of directors, at their own instance, *or any one or more shareholder or shareholders whose shares shall [*585 amount to ——— parts of the whole number of shares, shall have the power at any time to require the directors to convene an extraordinary general meeting of shareholders, which meeting shall be convened by circular letter addressed to and forwarded by post to the shareholders,

according to the last address entered in the cost-book, and stating the object of such meeting; and, at every such meeting as last aforesaid, the shareholders then personally present, or by proxy, or the major part thereof, shall be at liberty to amend, alter, or annul, either wholly or in part, any of the provisions, rules, and regulations of the company; and to make any new or other rules, regulations, or provisions in lieu thereof, which shall thenceforth be binding upon the said company and the shareholders thereof.

"23. The shareholders shall be at liberty, at reasonable times, to inspect the cost-book.

"25. Every shareholder shall be at liberty, on giving notice in writing to the purser, for entry in the cost-book, and on forfeiture of all moneys paid upon his or her shares, to relinquish such shares in the said company; and thenceforth he or she shall cease to have any interest in, and be freed from all future liability in respect of, the said company: provided that no such relinquishment shall be of any effect, unless and until the shareholder so relinquishing his or her shares shall have satisfied all his or her then existing liabilities to or in respect of the said company."

The question for the decision of the court of appeal, is,—whether the said rule to show cause ought or ought not to have been made absolute.

If the court should be of opinion that the said rule ought to have been made absolute, the said verdict for the plaintiff was to be set aside, and instead thereof a verdict entered for the defendants. If the court
*586] should *be of opinion that the said rule was properly discharged, the said verdict was to stand.

The appeal came on to be heard in the Exchequer Chamber on the 9th of May, 1857, the judges present being, Coleridge, J., Wightman, J., Erle, J., Martin, B., Crompton, J., Bramwell, B., and Channell, B.

J. H. Hodgson (with whom was *Byles*, Serjt.), for the defendants, the appellants.—The main point is, whether there was any evidence to fix Willingale and Weatherley. It was incumbent on the plaintiff to show that the money sought to be recovered was received by all the defendants. Now, as to Willingale, there is no evidence at all. He never was present at any meeting of the directors: the only circumstance which can at all affect him, is, the prospectus, which seems to have been issued with his authority. The mere fact of his name appearing as a director in the prospectus, clearly does not render him liable. The argument and the decision on this point in the court below rest upon the fact that the prospectus directs the payments to be made to Lubbock & Co. as the bankers of the company, and that the bankers gave a receipt for it as for money received on account of the company; Willes, J., in particular, observing that it was matter of indifference in whose names the account was kept in the books of the bankers. Assuming but not admitting that to be so, it still leaves untouched the question as to who constituted the company. The facts in Burnside *v.* Dayrell, 3 Exch. 224,† 6 Railway Cases 67,—which was not cited in the court below,—are remarkably coincident with those of the present case. There, an allottee in a projected railway company had paid his deposit into the bank named in the prospectus, *which had been circulated by the defendant's sanction*,
*587] his name appearing therein *as one of the provisional committee, and as chairman of the committee of management; but the

defendant had not personally superintended the allotment of shares, and had taken no active part in the concern, and had been present once only at any meeting, when he acted in the capacity of chairman, but dissented from the proceedings: and it was held, in an action by the plaintiff against the defendant for the recovery of his deposit, on the abandonment of the scheme, that the defendant was not liable. [MARTIN, B.—Did the court there suggest by whom the money was received?] No. In giving judgment, Pollock, C. B., says: "The defendant can only be liable because he was the person, or one of the persons, to whom the deposit was paid. There was no evidence that such was the case in the present instance. The defendant never acted at all, except by once attending a meeting as chairman, and *by concurring in the circulation of the prospectus.* The attendance on the 3d of November has nothing to do with this part of the case: the prospectus only points out the course to be pursued by the parties desirous of getting shares, namely, by application to the provisional committee. If, acting on this, the plaintiff applied to A., B., and C., three members of the provisional committee, and deposited the money with them, this might bind the defendant to permit the plaintiff to be a member of the company when formed, but it does not make the defendant liable for money not paid to him, when the project has failed. The plaintiff must recover back his money from the parties to whom it was paid. Although the money was paid to the bankers named in the prospectus, it was not paid to the use of the defendant, nor was there any proof that the defendant ever received or could have received any part of it. There was no evidence that he was one of the persons in whose name the account was opened with the bank where the money *was kept." "There is no difference, as far as the defendant is concerned, between the case of [*588 money received by other members of the provisional committee, and goods furnished by order of other members of the committee. The parties paying the money must look to those to whom they paid it, as tradesmen furnishing goods must look to the parties by whom they were ordered, or, if credit was given, they must prove that it was with the sanction of those whom they seek to charge." [MARTIN, B.—That case was decided just after the turning of the tide in the provisional committee cases.] It has never been overruled. [ERLE, J., referred to Wontner *v.* Shairp, 4 C. B. 404 (E. C. L. R. vol. 56). BRAMWELL, B.—To whom is the plaintiff's letter of application for shares addressed?] To the committee of management. [COLERIDGE, J.—Of whom Willingale is one. BRAMWELL, B.—Willingale issues a prospectus in which he is called a director. Surely that is primâ facie evidence that he *is* a director.(*a*) COLERIDGE, J.—The receipt of the money *by the [*589 bankers is a receipt on account of the company. BRAMWELL, B.

(*a*) See Drouet *v.* Taylor, 16 C. B. 671 (E. C. L. R. vol. 81). A company was projected for the working of mines in Belgium. A prospectus was printed, describing the objects of the association, naming A., B., C., and D. as directors, and Messrs. Martin, Stone & Co. as the bankers of the company, and stating that "the deposits would be returned in full, without any deduction for preliminary expenses, in the event of the non-prosecution of the company." In an action by an allottee of 500 shares, to recover back, on the abandonment of the project, the 250*l.* paid by him thereon to Martin, Stone & Co., the plaintiff, in order to show D. to have been a director, proved that he was seen ten or twelve times at the offices of the company, and twice in the directors' room; that he took some of the prospectuses for the purpose of circulation amongst his acquaintance; and that his name appeared, with the others, at the head of the

—Suppose the money had been paid at the office of the company, five only of the directors being present,—would a payment to those five be a payment to all the directors?] No doubt, it would be assumed to have been received by all. [Martin, B.—It is immaterial to whom the money is paid, provided it was paid in the manner directed by Willingale.] There was no evidence that Willingale ever sanctioned the issuing of the letter of allotment. As he never acted, and the account to which the money was paid was not in his name, it is submitted there was no evidence to show that the money was either expressly or impliedly received by him.

Then, as to the other point. It cannot be disputed, that, in general, one who takes shares in a public company which is to consist of a given number of subscribers and amount of capital, may repudiate the transaction unless the whole amount is raised: but, where the party knows at the time he subscribes his money that the undertaking is to be proceeded with at once, notwithstanding that a part only of the shares are disposed of, the case is different. Here, the plaintiff learned from the prospectus that the mine was in actual work; and he must have known that his money would at once be applied, for, unless the mine continued to be worked, and royalties to be earned, the mine would be forfeited. *590] [Bramwell, B.—The important *inquiry is, not whether the mine was at work, but whether the company was formed. How soon may a company be said to be formed? As soon as three or four people have been induced to part with their money?] At all events, the scheme is not to be deemed abortive until a reasonable time for the formation of the company has elapsed. The application for shares was made on the 21st of April, 1853. The prospectus shows that the company was then established. It was in evidence that it is usual in the case of cost-book companies to begin with less than the whole amount of the nominal capital paid up. Nockels *v.* Crosby, 3 B. & C. 814 (E. C. L. R. vol. 10), 5 D. & R. 751 (E. C. L. R. vol. 16),—which will probably be cited on the other side,—was the case of a tontine, where all the subscriptions must necessarily be paid up before the association can begin its operations. [Martin, B.—Do you contend that there should be a new trial on the ground that the question was not properly submitted to the jury? or, that there was *no* evidence to go to a jury? And, are we to draw inferences of fact?] It is submitted that the question should have been left to the jury. [Coleridge, J.—What do you say should have been left to the jury upon this point?] Whether the plaintiff did not authorize the application of his money to the purposes of the concern, notwithstanding that all the shares had not been allotted. [Coleridge, J.—It seems (from the report of the case in the court below) that the Lord Chief Justice told the jury that the circumstance of this being the case of a company for working a mine on the

company's account with the bankers. The plaintiff also put in the bankers' pass-book, containing entries of receipts of cash on account of the company; but there was nothing to identify any part of it as the 250*l.* paid in by the plaintiff. The pass-book was received, as being evidence because proved to have been seen in the hands of C., one of the defendants:—Held, by the Exchequer Chamber, that the pass-book was no evidence against D., there being no proof of the account having been opened in his name, with his consent, or subsequent acquiescence; and that there was no evidence to go to the jury that D. was a director at the time that the plaintiff paid the 250*l.* to Martin, Stone & Co. And see 14 C. B. 487 (E. C. L. R. vol. 78).

cost-book principle, did not take it out of the ordinary rule: and that direction is not now complained of.] The case proceeded upon that assumption, which, it is submitted, is an erroneous one. [COLERIDGE, J.—For anything that appears before us, the Lord Chief Justice may have left the case to the jury precisely in the way in which you now insist it ought to have been left.] *The case of The Great Cam- [*591
brian Mining and Quarrying Company, 2 Kay & J. 253, is a strong authority to show that the plaintiff here has no cause of action. There, a mining company by its prospectus and certificates professed to be a company in 30,000 shares of 1*l.* each, to be conducted upon the cost-book principle: the directors passed rules, by one of which the company was to be considered as constituted, and the directors to be at liberty to commence business, so soon as one-third of the shares should have been subscribed; and by another, that no person should be recognised as an adventurer in or entitled to any benefit from the company until he should have signed the rules, and been duly registered in the cost-book as an adventurer: W. H., having seen the prospectus, but not the rules, applied verbally and paid for and received certificates of shares in the company: the certificates stated that the shares were to be held subject to the rules of the company: the company failed: W. H. a year after he received the certificates brought an action to recover back his money, and the action was compromised: it was held, that, although W. H. had not signed the rules, still, having applied and paid for and accepted the certificates of shares, he had authorized the company to register his name in the cost-book without his signing the rules; that the contract was complete; and that he was a "contributory."

J. Brown (with whom was *Douglas Brown*), contrà.—If the learned judge who tried the cause had been asked to leave it to the jury whether the case was varied by the circumstance of this being a cost-book mining company, he would have done so. The point, however, was, with the assent of both sides, reserved as a point of law for the consideration of the court. [MARTIN, B.—How do we know, as a matter of law, what *a cost-book mine is?] Vice Chancellor Wood, in the case of [*592
The Great Cambrian Mining and Quarrying Company, expressly says that rules peculiar to the cost-book system must be proved. And the like was ruled in Barstow *v.* Reynolds, 24 Law Times 83, 118, 278. [CROMPTON, J.—We are bound by the grounds stated in the rule, upon which the judgment of the court below proceeded.] The authorities are clear, that a party does not become liable as a contributory merely by reason of his applying for shares and paying the deposit, unless the company is actually formed in accordance with the terms of the prospectus. It is said that the present case is taken out of the ordinary rule, because the plaintiff must have known when he subscribed his money that the mine was to commence working at once. That, however, is a fallacy. The prospectus shows that the mine was being worked by the former proprietors; and that the capital required for the formation of the company was 12,000*l.* In Hutton *v.* Thompson, 3 House of Lords Cases 161, 192,—where the question was whether a party who had applied for shares and paid a deposit in a company which was provisionally registered, but was never finally established, was liable as a contributory,—the Lord Chancellor said: "The case of Nockels *v.* Crosby, 3 B. & C. 814 (E. C. L. R. vol. 10), 5 D. & R. 751 (E. C. L. R. vol. 16), long ago decided

that the preliminary expenses of an abortive scheme must be borne by the projectors, and cannot be thrown upon those who agreed to become shareholders in a projected company which was never established." That has been acted upon over and over again. So, in Ashpitel *v.* Sercombe, 5 Exch. 147, 162,† Patteson, J., in delivering the judgment of the Exchequer Chamber, says: "There seems to be no doubt that the plaintiff, having paid his money for shares in a concern which never
*593] came into existence, or a scheme which was abandoned before it *was carried into execution, has paid it on a consideration which has failed, and may recover it back as money had and received to his use, unless he can be shown to have consented to or acquiesced in the application of the money which the directors have made." Then it is said that there was no evidence to fix Willingale with the receipt of the money, his name not appearing at the head of the account at the bankers': and Burnside *v.* Dayrell, 3 Exch. 224,† 6 Railway Cases 67, was relied on. That case, however, is inconsistent with Moore *v.* Garwood, 4 Exch. 681,† which more nearly resembles this case. There, the deposit was paid into one of the banks mentioned in the prospectus of the company, on account of the company, and to their credit, the defendant being a member of the managing and also of the provisional committee: and, upon application by the plaintiff for a return of his deposit, he received from the attorney of the company an answer to the effect that arrangements for that purpose were being made; and it was held, that there was evidence that the money was had and received by the defendant. [Erle, J.—The account here was kept in the names of five of the directors only. Crompton, J.—Parties paying in money would suppose they were paying it to the credit of *the company*, though, for their own purposes, they chose to keep the account in the names of a certain number of directors only.] The prospectus, which was issued by all the directors, contains an express authority for the payment of deposits to the credit of *the company* with the bankers. And by the rules of the company, the general control over the funds at the bankers' is given to *all* the directors,—see rule 12.

Hodgson was heard in reply. Cur. adv. vult.

*594] *Coleridge, J., now delivered the judgment of the court: This was an appeal from the judgment of the Court of Common Pleas upon a rule to enter a verdict for the defendants; and the rule was granted on two grounds,—first, that, in the case of a cost-book company, the plaintiff is not entitled to recover the price of his shares, or his deposit, if all the shares have not been subscribed for,—and secondly, that there was no evidence against two of the defendants, Willingale and Weatherley.

The Court of Common Pleas discharged the rule; and, it having been granted on those two grounds, we are limited to the consideration of those only, and are of opinion that the defendants failed on both, and that the court therefore rightly discharged the rule.

Upon the first,—the general rule appears to be admitted, and the defendants contend only, that, the company being formed on the cost-book principle, it does not apply. The question then arises, on what contract did the depositors or subscribers for shares in fact pay their money? Was it not that the receivers should hold it to be applied to the purposes of the projected company if, and when, it should be fairly

established? and, if it should not be established, to be returned to them? In other words, that, in the event of the non-establishment, and in the absence of authority to employ it in the mean time otherwise, it should be held to the use of the parties paying it in? The shares not being taken is one great and common cause of the failure to establish such companies; though it does not follow, in the extreme case put in the argument, that a concern should necessarily be deemed abortive, because one or two, or proportionably a few less than the stipulated number of shares should be taken, and the company goes on notwithstanding. Here, a great proportion of the shares were not taken: and the concern was in fact *abandoned. There would, therefore, have been ample evidence [*595
in an ordinary case to warrant the jury in finding that the state of facts had arisen on which the deposits ought to be returned. Nor are we aware of anything in the cost-book principle which ought to affect this conclusion. It is true that the mine had been at work some years ago, and also that the proprietors from whom the company at the time of issuing the prospectus had agreed to purchase it, were at the date of such agreement in the course of mining operations, or the preparation for them; but it does not therefore follow that the subscribers must be taken to have authorized the directors to expend their money in continuing such operations, so long as the share-list remained to a considerable extent unfilled, and while it was uncertain whether it would ever be filled up, and the concern really established. This, however, was for the jury.

On the second question, we think that the prospectus issued by the authority of all the defendants, and the rules and regulations, were evidence against all that money for shares might be properly paid to the bankers named in the prospectus, and in the rules and regulations, as the agents of the directors. These bankers gave receipts as for the company; and, though they entered the moneys received to an account in the names of particular directors, this could not affect the right of the parties paying them in. That was an act between the bankers and the directors subsequent to the paying in, with which those who paid in had no concern. We think, therefore, that the defendants were responsible to the depositors for the moneys so paid in. On both grounds, therefore, we think that the judgment should be affirmed.

It is right to state that my Brother Wightman must not be understood as taking part in this judgment. Judgment affirmed.

*SAMPSON *v.* HODDINOTT.(a) *Nov.* 28. [*596

ERROR upon a judgment of the Court of Common Pleas,—1 C. B. N. S. 490 (E. C. L. R. vol. 87).

Judgment affirmed (without argument), by consent.

(a) The defendant being the moving party, the names of the plaintiff and defendant in the proceedings in error, in this, as in the next case, were *reversed*. The reporter has, however, thought it more correct to describe the cause by its original title, the Common Law Procedure Act, 1852,—15 & 16 Vict. c. 76, s. 148,—having abolished *writs* of error, and declared that "the proceeding to error shall be a step *in the cause*."

The same inconvenient uncertainty prevails in practice with regard to appeals under the

Common Law Procedure Act, 1854,—17 & 18 Vict. c. 125, ss. 34, et seq. Sometimes the original title of the cause is preserved throughout, whichever side may be the appellant, as in Roberts v. Eberhardt, antè, p. 482, and Hickman v. Cox, antè, p. 523, and sometimes the names of the parties are reversed.

The case which started in the court below as Hickman v. Cox and Wheatcroft, became in the House of Lords "Wheatcroft and Blackwell and Smith,"—the parties having arranged to take the opinion of the court of ultimate appeal in *another* case arising out of the same deed, which involved a claim for goods sold and delivered as well as upon a bill of exchange.

The more convenient course in *these* cases obviously would be, to intitule them as all other appeals have usually been intituled,—"Eberhardt, appellant, Roberts, respondent," for instance.

*597] SHEEHY v. THE PROFESSIONAL LIFE ASSURANCE COMPANY. *Nov.* 28.

The 43 G. 3, c. 53 (Irish), s. 8, provided that, whenever it appeared to the court out of which the process issued that all due diligence had been used to have the process personally served, yet that, under the special circumstances, appearing to the court by affidavit, it was impossible to procure personal service, it should be lawful for the court to substitute such other kind of service as to them should seem fit.

The 8th section of the 13 & 14 Vict. (Irish) c. 18, in the case of corporations, provides for service upon corporate bodies having a known and responsible officer or agent, by serving such agent, and authorizes the plaintiff, in default of appearance by the defendants, upon affidavit of such service, and of the publication of a notice of the issuing of the writ in the Dublin Gazette and in a local newspaper, to enter an appearance and proceed.

And the 9th section enables the court or a judge, where it is made to appear that the defendant has not been personally served, and that due and proper means were used to serve the writ, "or that such defendant resides out of the jurisdiction of the court, and can be properly served through or upon any agent, or has removed to avoid service, or on any other good and sufficient grounds," to authorize such substitution of service through the post-office, or in such manner as to them or him shall seem fit.

A writ of summons issued out of the Court of Queen's Bench in Ireland, after the passing of the last-mentioned act, against an incorporated joint stock company registered and carrying on business in London, and also carrying on business by one R., an agent, in Dublin, was, under an order of the court for substituted service, served by delivering a copy, with a copy of the order, to the Dublin agent, R., and by sending similar copies by post, addressed to the company's agent at their office in London. An appearance was afterwards, by leave of the court, entered upon such service, and judgment signed against the company:—

Held,—affirming the judgment of the Court of Common Pleas,—that an action might be maintained upon such judgment in the courts of this country; there being nothing to show that it was contrary to natural justice, or pronounced without jurisdiction.

ERROR upon a judgment of the Exchequer Chamber, affirming a judgment of the Court of Common Pleas, in an action upon a judgment of the Queen's Bench in Ireland, and also for costs of an order made in the suit there,—the original action being brought upon a policy effected with the defendants as hereinafter stated.

In January, 1852, the defendants, a joint stock company duly registered pursuant to the statute 7 & 8 Vict. c. 110, carried on the business of life assurance in London under the style of The Professional Life Assurance Company, their principal office being at No. 76, Cheapside, London, where one Edward Baylis was their manager, secretary, and actuary. They likewise had an agent in Dublin, named Ramsay, who was employed to obtain life assurances for them there.

On the 15th of January, 1852, the plaintiff commenced an action against the company in the Court of Queen's Bench in Ireland, upon a *598] policy of insurance effected *with them through their Dublin agent, and on the same day a copy of the writ of summons was served

upon Ramsay by one Egan, a messenger. No notice of the issuing of that writ was ever given or inserted in the Dublin Gazette, or in any of the local newspapers in the county, city, or district in which the defendants resided or carried on business, or in which Ramsay resided or carried on business, as required by the 13 & 14 Vict. c. 18, the act then in force for the regulation of process and procedure in Ireland.

On the 16th of January, upon the motion of the plaintiff, founded on an affidavit of service by Egan, an order was made by the Court of Queen's Bench in Ireland, that service of the writ upon the defendants, by delivering a copy of the writ and of the order to Ramsay, and sending copies thereof through the post to the London agent, should be deemed good service.

On the 19th of January, Egan served papers purporting to be copies of the writ and order (but which papers in fact were not true copies, the word "Life" being omitted therefrom respectively in the description of the company) upon Ramsay, and sent true copies of the writ and order through the general post, in a letter addressed to Baylis at the company's office in London.

On the 29th of January, upon an affidavit by Egan of the due service of the writ and order, an order was made by the Irish court that the plaintiff might enter an appearance for the defendants, therein described as "The Professional Assurance Company." An appearance was accordingly entered by the plaintiff; and, on the 4th of February, a declaration was filed, and on the 16th judgment was signed for want of a plea.

On the 21st of February, an application was made on behalf of the defendants to the Court of Queen's Bench in Ireland, to set aside the appearance and declaration, on the ground of irregularity: but the rule was refused, *with costs*.

*This action was commenced on the above judgment, and on the order for costs, on the 18th of December, 1852. The defendants pleaded never indebted, and also a special plea alleging that they never were served with process in the original action, that the appearance was irregularly entered for them by the plaintiff, and judgment signed against them when they were not within the jurisdiction of the Irish court, and had not been served with any summons or process to appear to the action. To this plea the plaintiff replied the order for substituted service, and the service under it. The defendants rejoined that they were at the time the order was obtained a corporation aggregate within the intent and meaning of the 13 & 14 Vict. c. 18, and that the order was obtained upon an affidavit representing that Ramsay was an agent of the company within the act, whereas in fact he was not such agent. The plaintiff surrejoined, setting forth the affidavit and the order for substituted service, and averring that the affidavit was true. To this the defendants demurred; and they also joined issue. [*599

The demurrer was argued in the Court of Common Pleas, in Trinity Term, 1853, before Jervis, C. J., Maule, J., Cresswell, J., and Williams, J., when judgment was given for the plaintiff, on the ground that the plea did not show that the defendants had not notice of the writ. See the report, 13 C. B. 787 (E. C. L. R. vol. 76).

The issues of fact came on for trial at the sittings after the same term, when the facts were stated in a special verdict, which came on for argument in the Court of Common Pleas in Trinity Term, 1857; and the

court, after time taken to consider, gave judgment for the plaintiff on the first count, and for the defendants on the second. See 2 C. B. (N. S.) 211 (E. C. L. R. vol. 89).

The defendants thereupon brought error in the Exchequer Chamber,
*600] and the case now came on for *argument before Coleridge, J., Erle, J., Martin, B., Crompton, J., and Watson, B.

The grounds of error were,—"That the judgment declared on was irregularly obtained in the Court of Queen's Bench in Ireland, and was a nullity as against the defendants,—that the defendants were not properly served with the writ or a copy of the writ of summons issued in the action in which the judgment was signed in Ireland,—that the name of the company in the writ of summons so issued differed from the registered name of the defendants,—that Ramsay was not such an agent of the company in Ireland as the act of 13 & 14 Vict. c. 18, for the regulation of process and practice in Ireland contemplated, upon whom a writ of summons issued against the defendants could be served,—that Baylis was not and is not shown to be or to have been the 'London agent' of the company mentioned in the order of the Court of Queen's Bench in Ireland of the 16th of January, 1852,—that it does not appear that any copy of the writ of summons issued in the Irish court, or of the order of the court, was ever served upon or ever reached Baylis, or the London agent of the company,—that the order of the Court of Queen's Bench in Ireland, of the 16th of January, to substitute service, was not intituled or made in the action there pending against the defendants,—that no copy of the writ of summons was served upon Ramsay, pursuant to the order of the 16th of January, 1852,—that no appearance was properly entered for the defendants in Ireland,—that there was not and had not been any sufficient or any notice of the issuing of the writ of summons in the Dublin Gazette and one local newspaper, as required by the act,—that there was no affidavit of any such notice as required by the 8th section of the statute,—that there was not and is not any such judgment against the defendants, and binding upon them in this action,
*601] *as mentioned in the first count,—that no action lies upon the order or rule declared on in the second count of the declaration,—that there was no rule or order made against the defendants in their registered name, or at all, so as to bind them,—that the 9th section of the act does not apply to a corporation at all, and at all events not to a corporation out of Ireland,—that the 8th section of the act does not apply to proceedings against the defendants' company,—that the defendants' company is not a company or corporation within the jurisdiction of the court in Ireland,—that there was not and is not any such secretary or officer of the defendants as contemplated by the 8th section of the act above referred to,—that there could be no service on any such officer within the meaning of that section,—that the 43 G. 3, c. 53, is not applicable to this case, and the judgment in Ireland cannot be sustained by virtue of such act,—that the Court of Queen's Bench in Ireland had no jurisdiction to authorize an appearance to be entered for the defendants, nor had that court jurisdiction to give judgment against the defendants, or to make such rule or order as in the declaration mentioned,—and that, even if they could have had such jurisdiction under the act referred to, there were conditions precedent to such jurisdiction, which had not been complied with or observed."

Bovill, Q. C. (with whom was *Byles*, Serjt.), for the defendants.—The main question arises upon the issue on never indebted. The judgment upon which this action is brought is obtained against the defendants, a corporation established in London, where they have an office and an agent. It appears also by the special verdict that the defendants carried on business likewise in Dublin, where they had an agent named Ramsay. A writ of summons having issued against the *defendants in the Court of Queen's Bench in Ireland, the service was [*602 effected by delivering a copy to Ramsay, the agent in Dublin, and by sending another copy by the general post addressed to Mr. Baylis, the agent of the defendants in London, at their principal office. No notice of the issuing of the writ was given in the Dublin Gazette or in any local newspaper of the city or district where the agent resided: but an order of the court was obtained declaring that the above should be deemed good service of the writ upon the company. And upon that order an appearance was entered for the defendants, and judgment signed. The question is, whether that is a valid judgment, binding upon the defendants in this country. Now, it is an indisputable principle of law, that no court can by its own inherent power acquire any jurisdiction beyond the limits of the territory in which it is established. Even the legislature of the three kingdoms cannot create a jurisdiction over subjects beyond their limits. It may, indeed, provide for the service of process on persons abroad; and a judgment obtained upon such service may be of force and efficacy against persons and property within the jurisdiction: but it can have no extra-territorial jurisdiction: See Story's Conflict, §§ 539, 556, 557. [MARTIN, B.—If you say that the judgment is a nullity, I can understand you.] The first proposition contended for, is, that there can be no jurisdiction beyond the territorial limits, by means of a service such as this. On the other hand, it will be insisted that the Irish court has acquired a jurisdiction over this corporation either by virtue of its own practice or by one or other of two statutes,—the 43 G. 3, c. 53, or the 13 & 14 Vict. c. 18. It was contended on the argument in the court below that the last-mentioned statute repealed the former: but the court gave judgment for the plaintiff on the ground either that the 8th section of the 43 G. 3, c. 53, *was [*603 not repealed by the 9th section of the 13 & 14 Vict. c. 18, or that the 9th section was complied with. The case, it is submitted, is not within either statute. The object of the 43 G. 3, c. 53, as declared by the preamble, was, to assimilate as far as might be the process of the Irish courts to that of the superior courts of this country: and the 8th section enacted, "that, whenever it appeared to the court out of which the process issued, that all due diligence had been used to have the process of the court personally served, yet that, under the special circumstances of the case, appearing to the court by the affidavit of the plaintiff or his attorney, or the attorney employed for the purpose of having the process personally served, that it was impossible to procure personal service, that then and in such case it should and might be lawful for the court out of which the process issues, to substitute such other kind of service as to them should seem fit." In the first place, it is submitted that that provision has no application to corporations at all. A corporation could not be served *personally:* the only mode of enforcing its appearance to process, was, by distringas; and that mode failed where

the corporation had no land or goods within the jurisdiction. The Irish courts seem to have assumed that the 8th section of the 43 G. 3, c. 53, did apply to corporations: but the *practice* will not enlarge the language of the act of parliament. The question of the power of the Irish courts to order substituted service was much considered in the case of Phelan *v.* Johnson, 7 Irish Law Rep. 527. Lord Chief Baron Brady, in giving judgment, refers to the statutes then in force for regulating the service of process in England, 12 G. 1, c. 29, and 5 G. 2, c. 27, and says,—"No powers are given by those statutes to substitute the service of process; in other respects, they are analogous to the 43 G. 3, c. 53; *604] but the first of them contains very *remarkable words. It provides, that, in all cases where the cause of action shall not amount to the sum of 10*l.* or upwards, and the plaintiff shall proceed by way of process against the person, he shall not arrest the defendant, but shall serve him personally, *within the jurisdiction of the court*, with a copy of the process. So that, in that act, there is no power to substitute service; and it is expressly required that the service be made within the jurisdiction. That being the condition of the law in England, the 43 G. 3, c. 53 (Irish), is now to be considered. It is analogous to the 12 G. 1 and the 5 G. 2 (English) so far as those acts prohibit arrest for sums under a specified amount, and in the mode of enforcing appearances. The 3d section of the 43 G. 3, c. 53, is that which corresponds with the 2d section of the 12 G. 1, c. 29; but it omits those remarkable words, 'within the jurisdiction of the court.' And that appears to have been done studiously. It is an omission deserving of great observation, and calculated to raise serious questions as to what were the purposes of the legislature in passing the 43 G. 3. Consequent on that omission, there is in the 43 G. 3 a special provision which exists in none of the English acts, viz. the 8th section, which authorizes the court to substitute service of the process. I apprehend that for the last forty years,—I may say, from the passing of that act,—there has been a current of decision, in this court, at least, which I conceive has put this construction upon this act of parliament, that it warrants the substitution of service upon a party not bodily present in this country." This court, it is conceived, will hardly go along with the Chief Baron in that. He then goes on—"In cases of actions upon policies of insurance, service of process has been from time to time substituted upon persons acting as agents of the insurance company, and making this contract for them; and that course of practice, hitherto undisturbed *605] *by any authority or legal proceeding, has continued; establishing the existence of a power in the court to act in substituting service of process upon persons not bodily present within the jurisdiction. So that it occurs to me, that, taking the course and practice of this court as one long established, it really comes to no more than a question of discretion how far the court will exercise the power given to it by the act; and I think it has not unwisely considered that it had this power, having regard to the omission of those remarkable words in the 43 G. 3, and the introduction of the clause authorizing the substitution of service into it. How far that modification of the English acts was made in the 43 G. 3, by reason of the peculiar circumstances of this country, is not for me to consider. I may think it was designed to meet the circumstances of the country; but it is sufficient to say that there is no unsubstantial ground for the opinion that the court originally was

right in assuming that the act gave them jurisdiction to substitute service on persons not bodily within the jurisdiction." That was not, like this, the case of an attempt to enforce a judgment so obtained out of Ireland: and the Chief Baron at the end of his elaborate judgment has this important qualification,—"How far the plaintiff may make any judgment he may obtain in this case available, or whether he can make it available elsewhere than in Ireland, is not for us to consider: but, regard being had to the decisions in England with respect to foreign judgments, I think it would be difficult for the defendant to contend successfully that a judgment here would not bind him there." And undoubtedly it would, if the case were brought within the words of an act of the imperial legislature. [MARTIN, B.—Do you contend that this proceeding was a nullity?] Yes. The case of The Bank of Australasia *v.* Nias, 16 Q. B. 717 (E. C. L. R. vol. 71), shows that, in an action on a foreign or colonial *judgment, the judgment is examinable for the purpose of showing want of jurisdiction, or that the defendant was not summoned, or that the judgment was fraudulently obtained, though it is not examinable upon the merits, as, for the purpose of showing that the contract sued upon was not made, or was procured by fraud, or that the judgment was erroneous. It all comes to a question of jurisdiction. [COLERIDGE, J.—The 43 G. 3, c. 53, *assumes* that the jurisdiction exists; it merely professes to regulate the practice of the court.] To make this a valid judgment, it must be shown that the provisions of the statute have been strictly complied with; and this cannot be done. For instance, the 8th section requires that the special circumstances which are to set the court in motion shall be made to appear by *the affidavit of the plaintiff, or his attorney, or the attorney employed for the purpose of having the process personally served:* and that provision was not complied with here; for, the only affidavit produced was that of a common process-server. The words "as to them shall seem fit," do not empower the court to authorize a service in a foreign country. The 13 & 14 Vict. c. 18 virtually repealed and put an end to the powers and provisions of the 43 G. 3, c. 53, at all events as to the new process established by that act. The title of the act is, "An act for the regulation of process and practice in the superior courts of common law in Ireland;" and the preamble states that "the process now in use for the commencement of personal actions in Her Majesty's superior courts of common law in Ireland, is, by reason of its variety, multiplicity, and fiction, inconvenient and objectionable, and it is expedient, for the better administration of justice, to establish uniformity of process and practice in the said courts." It is impossible in the face of that to say that all the old statutes and ancient practice as to service of process, are *still existing. [CROMPTON, J.—Appearance sec. stat., for instance.] Just so. The new act contains various provisions for "substituted service." In Dwarris on Statutes, 2d edit. p. 477, it is said: "It is, as a maxim, generally true, that, if an affirmative statute which is introductory of a new law, direct a thing to be done *in a certain manner*, that thing shall not, even although there are no negative words, be done in any other manner." For this the author cites Slade *v.* Drake, Hobart 298, Wethen *v.* Baldwin, 1 Sid. 55, 56, Rex *v.* Sparrow, 2 Stra. 1124, and 2 T. R. 395. Now, here, the recital of the 13 & 14 Vict. c. 18, virtually sweeps away all the old process, and all former statutory provisions

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applicable to it. The 2d section provides for the ordinary case of service, which must be personal, and within the jurisdiction of the court. The 7th section provides for the entry of appearance, where the defendant has been served personally. Then comes the 8th section, which proposes to make provision for the service of process upon incorporated bodies and the like, and which in substance and in terms applies to the case now before the court: and that requires a notice of the issuing of the writ to be given in the Dublin Gazette and in a local newspaper. The argument on the other side is, that, notwithstanding that express provision, the 43 G. 3, c. 53, s. 8, is still in existence, and authorizes the court to substitute service in any manner and in any place they may think proper. It is conceded that the case is not within the 13 & 14 Vict. c. 18. [COLERIDGE, J.—Here is a corporation, residing, as far as a corporation can reside, out of the jurisdiction of the court, but having a known responsible agent within the jurisdiction, through whom they can be properly served. Suppose there has been no personal service, but application is made to a judge at Chambers to authorize substituted *608] service, and a question arises as to *whether or not there has been a sufficient notice given in the Gazette, and the judge improperly decides that there has been, and directs an appearance to be entered; and suppose that order was brought for review before the Irish court, and they improperly upheld it: could all that be ripped up in an action upon the judgment in this country?] It is submitted that it might. [ERLE, J.—Do you contend that this judgment was erroneous and reversible in Ireland? or was it a mere irregularity?] It is altogether a nullity: it proceeds upon an assumption which has no foundation in fact, viz. that the requirements of the statute have been complied with. [ERLE, J.—Where jurisdiction depends upon a fact, the question whether a court can give itself jurisdiction by finding the fact, is one I have never seen decided.] The Court of Common Pleas decided that the case was either within the 9th section of the 13 & 14 Vict. c. 18, or within the 43 G. 3, c. 53. There is nothing, however, in the former enactment which applies to corporations: it could only be intended to apply to persons capable of being served personally: if it embraced corporations, it would virtually repeal the 8th section. This difficulty was attempted to be got over by a reference to the interpretation clause, s. 51: but the words in s. 9, are not "party" and "person," but "defendant." Upon this point, the court below express no opinion,—Cresswell, J., in delivering judgment, observing, that, "if it had been necessary to the maintenance of this action to say that the 9th section gave the court power to order substituted service in this case, there would probably have been some difference of opinion on the bench." [COLERIDGE, J.—You are inviting us to consider whether that which was done in the Irish court was rightly done there. If this had been the case of an individual residing in Ireland, instead of a corporation carrying on business here, the question would have been *609] *the same. Could the individual in that case have set up the absence of natural justice, in an action brought upon the judgment here? ERLE, J.—I have always understood that the only ground upon which our courts can refuse to give effect to a foreign judgment, is, that the whole foundation of the proceeding in the foreign court fails.] The contention here is, that the whole foundation for this judgment fails,

because the Court of Queen's Bench in Ireland had no jurisdiction. [WATSON, B.—The question is whether the proceeding is contrary to natural justice.] Story, in § 539, says: "Vattel (B. 2, Ch. 8, § 84) lays down the true doctrine in clear terms. 'The sovereignty (says he), united to domain, establishes the jurisdiction of the nation in its territories or the country which belongs to it. It is its province, or that of its sovereign, to exercise justice in all places under its jurisdiction, to take cognisance of the crimes committed, and the differences that arise in the country.' On the other hand, no sovereignty can extend its process beyond its own territorial limits, to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals." And Parke, B., in Jefferys *v.* Boosey, 4 House of Lords Cases, 815, 926, says: "It is clear that the legislature has no power over any persons except its own subjects, that is, persons natural-born subjects or residents, or whilst they are within the limits of the kingdom. The legislature can impose no duties except on them; and, when legislating for the benefit of persons, must primâ facie be considered to mean the benefit of those who owe obedience to our laws, and whose interest the legislature is under a correlative obligation to protect."

Shee, Serjt. (with whom were *J. A. Russell* and **Finlason*), contrà.(*a*) The only question for the consideration of the court [*610

(*a*) The points for argument on the part of the plaintiffs, were as follows:—

"1. That the original judgment cannot be deemed a nullity, unless it appear clearly that it was obtained in a manner contrary to natural justice; and that this by no means appears, for it does not appear that the defendants had not notice and knowledge of the writ before the judgment, nor that they were not actually served with it in time to appear:

"2. That it sufficiently appears that the defendants had notice of the writ, and were actually served with it in time to appear thereto before the judgment was signed:

"3. That, according to the common law of England and Ireland, such service as it appears took place could at the worst be only irregular; so that the judgment would, unless such service were set aside for irregularity, be valid; and that, whether it could be so set aside, was a matter merely of practice, which it must be presumed was decided according to the course and practice of the court in Ireland, and on which there is by law no appeal to the courts of this country:

"4. That, even supposing it necessary, in order to sustain the judgment, to have recourse to the statute referred to, whether Ramsay was an 'agent' within its meaning and effect, was a question of fact properly determinable by the court in Ireland, and which it appears was determined by that court, and which it must be presumed was rightly determined:

"5. That, even if the court can see that the question was wrongly determined, it appears that it was a mere matter of irregularity, not affecting the validity of the judgment:

"6. That it appears that the defendants did by their counsel and attorney actually appear in the court in Ireland, and apply to set aside the judgment on the ground that notice of it had not been published in the Gazette, and did admit that they had been in fact served with, or had notice and knowledge of, the writ in time to appear thereto according to its exigency:

"7. That all the matters relied on by the defendants are matters of mere irregularity of which they cannot now take advantage, and were not conditions precedent to the validity of the service or judgment:

"8. That Ramsay was an agent of the company within the meaning of the statute, upon whom service might be made:

"9. That Baylis was a manager or agent of the company upon whom service might be made, and that his having been served out of the jurisdiction of the Irish court, or by letter, was a mere matter of irregularity, of which the defendants did not when before the Irish court seek to take advantage, and of which they cannot now take any advantage, and that judgment upon such service was valid:

"10. That the company was a corporation within the meaning of the statute, and within the jurisdiction of the Irish court:

now is, whether the substituted service authorized by the Irish court was so defective and *nugatory that a judgment founded upon it is *611] contrary to natural justice, and incapable therefore of being made the foundation of an action in the courts of this country. The answer to the objections which have been urged on the other side is threefold,—first, that the proceedings in the Irish court were in strict conformity with the 13 & 14 Vict. c. 18, s. 9,—secondly, that they were good at common law, independently of any statutory provision,—thirdly, that the grounds of the judgment are not examinable here at all. 1. The statute contemplates and provides for three cases,—one, where an appearance may be entered, under s. 7, on the defendant's default where he has been served personally; and this is a mere re-enactment of the law as it stood before,—the second, under s. 8, where the defendants are a corporation or aggregate body *in Ireland*, who are to be served through a known officer or agent; and, in that case, to make the service *612] good, a notification of the *issuing of the writ is to be given in the Dublin Gazette and in a local newspaper,—and the third, under section 9, which contemplates two conditions of things, one applicable to cases where the defendant (including corporations) is within the jurisdiction, the other where the defendant is out of the jurisdiction and can be properly served through an agent, or has removed to avoid service. The present case falls within the second category. On these, or "on any other good and sufficient grounds" (of which the court alone is to judge), it may authorize a substitution of service in such manner as it shall think fit. It is true that "defendant" is the only word used in describing the party to be affected by the service. But the interpretation clause provides that "any words importing the singular number or the masculine gender only shall be understood to include several persons as well as one person, and *bodies corporate* as well as individuals," unless it be otherwise provided, or there be something in the subject or context repugnant to such construction. Now, the word "defendants" in s. 8 is expressly intended to include corporations. [He was here stopped by the court.]

COLERIDGE, J.—Without expressing any opinion upon a great deal of the argument which has been urged on the part of the defendants,—and certainly, so far as my own individual opinion is concerned, desiring not to be understood as acquiescing in many of the points which have been made,—upon the short point of the interpretation which is to be given to the 9th section of the 13 & 14 Vict. c. 18, I think the judgment of the Court of Common Pleas must be affirmed. That section contemplates a case where the plaintiff has not been able so to proceed as to authorize him, without applying for the assistance of the court, to enter an appearance for the defendant. If this had been the case *613] *of an individual, without taking upon myself to decide whether the Irish court pronounced rightly or wrongly,—a question with which we have nothing at all to do,—it seems to me to be quite clear

"11. That the statute 43 G. 3, c. 53, s. 8, and the 8th and 9th sections of the statute 13 & 14 Vict. c. 18, did apply to the company, and authorise such proceedings as it appears took place, and which it is contended rendered the judgment regular and valid:

"12. That the court in Ireland had jurisdiction to make such orders as it appears they made, and that such orders rendered such proceedings as it appears took place regular and sufficient, and the judgment regular and valid."

that that court was acting within its jurisdiction, and having determined it, we have no right to question the propriety of its judgment. The only question really is, whether or not the section I have referred to applies to the case of a corporation. Mr. *Bovill* has contended very strenuously that it does not: he says, that, though by the interpretation clause (s. 51) "person or persons" may include bodies corporate as well as individuals, yet in this section the word "defendant" only being used, it cannot extend to a corporation. Now, we have only to look to the section immediately preceding, to satisfy ourselves that "defendants" must be taken to extend to and include corporations. The word "defendant" is there used directly after a provision in respect to an incorporated body having a known or responsible officer or agent who may be served personally: the section then goes on to provide, that, "if any such defendant," &c.,—clearly comprising amongst others the defendants mentioned in the previous part of the section. Then, if that be so as to section 8, I do not see why we should not hold the word "defendant" in s. 9 also to extend to corporations,—a construction which certainly is more in accordance with good sense and the necessities of the act of parliament than that contended for on the part of the plaintiffs in error. Cases must frequently arise where substituted service becomes necessary as to corporations. That is really the only question we have to determine; for, it is not for us to consider whether the Court of Queen's Bench in Ireland rightly or wrongly held substituted service to be admissible. That is a question of mere practice, and not of jurisdiction. For *these reasons I think the judgment of the court below should be affirmed. [*614

ERLE, J.—I concur with my Brother Coleridge in thinking that the judgment of the Court of Common Pleas ought to be affirmed. If I had been satisfied that the defendants in the original suit never were in court so as to have an opportunity of being heard in their defence, it might have been necessary to consider whether a judgment pronounced against them was not so contrary to natural justice that it ought not to be held binding and conclusive against them in this country. Before I consent to the reversal of this judgment, I must be satisfied that the Irish court had no jurisdiction, and that its proceedings were contrary to natural justice. Now, so far from the court having acted without jurisdiction, the case seems to me to be precisely one of those for which the legislature intended by s. 9 to provide; and, so far from the proceeding being in my judgment contrary to natural justice, I am not at all prepared to say that I should not have come to the same conclusion that the Irish court came to. The legislature having, in s. 7, provided for personal service in the case of individuals, proceeds in s. 8 to enact that every writ issued against an incorporated body having a known and responsible officer or agent, may be served personally on such agent; and, in the event of non-appearance, the plaintiff may, upon affidavit of such personal service, and upon giving notice in the Dublin Gazette and in a local newspaper, enter an appearance for the defendants. Section 9 is an additional provision for cases not before regulated: it enacts, that, "in case it shall be made appear by affidavit to the satisfaction of the court in which the appearance to the process should be made, &c., that any *defendant*,"—which is a word quite wide enough to embrace a

*615] *corporation,—"has not been personally served with any writ of summons, and has not according to the exigency thereof appeared to the action, and that due and proper means were used to serve such writ, or *that such defendant resides out of the jurisdiction of the court, and can be properly served through or upon any agent or representative or any manager of the real or personal estate of such defendant within such jurisdiction*, or has removed to avoid service, or *on any other good and sufficient grounds*, it shall be lawful for such court or judge to authorize such substitution of service, through the post-office, or in such manner, and with such extension of time for service and appearance, as to them shall seem fit; and, upon due proof of such substituted service, by affidavit, it shall and may be lawful for the plaintiff, in default of appearance by such defendant in due time, to enter an appearance for such defendant, and to proceed thereon as if such defendant had entered his, her, or their appearance, any usage or law to the contrary notwithstanding." These words appear to me to give the court a very large and wholesome jurisdiction to determine in what cases they will in their discretion allow a substituted service, though all the requirements of the statute may not have been strictly complied with. So far, therefore, from thinking that the judgment upon which this action is brought was pronounced without jurisdiction, or contrary to natural justice,—if it were necessary for me to go that length,—it appears to me that there was ample foundation for it, and consequently that there is no ground for impeaching the judgment of the court below.

CROMPTON, J.—I am of the same opinion, and upon the same ground. The 7th and 8th sections of the 13 & 14 Vict. c. 18, regulate the mode of proceeding by the plaintiff himself to bring the defendant into court.

*616] *The 7th provides for personal service of process upon an individual. The 8th provides for the case of corporations upon whom personal service in the ordinary way cannot be effected. In both, it is the plaintiff who is, without any leave of the court, to make the regular service under the act: but, when that power is given in the case of corporations, the legislature limit it by requiring, in addition to the affidavit of service on the person to whom the process is given, that a notice shall also be given in the Dublin Gazette and in a local newspaper. Then comes the 9th section, which seems to me to be extensive enough to reach the case of a corporation as well as of an individual. When the sufficiency of the service is to be judged of by the court or a judge, there may be very good reason for dispensing with the notice in the Gazette and newspaper. Corporations are expressly comprised within the term "defendants" in s. 8; and there is no reason why they should not also be included in s. 9. That section gives the court or judge very general power not only as to the mode of serving defendants, but also as to service on agents or representatives of defendants. It empowers the court or judge, in the most general terms, where it is made to appear "that the defendant resides out of the jurisdiction of the court and can be properly served through or upon any agent or representative or any manager of the real or personal estate of such defendant within the jurisdiction, or has removed to avoid service, or *on any other good and sufficient grounds*," to authorize "such substitution of service through the post-office or in such manner as to them or him shall seem fit." I

cannot, therefore, see that the court in Ireland did wrong when they made the order for substituted service upon which the judgment was signed. At all events, I think it is impossible to say that it was a matter upon which they were not competent to decide, or which was out of their *jurisdiction, or that their decision upon it was contrary to natural justice. [*617

MARTIN, B.—I am of the same opinion. According to my view of the statute, the 7th section is directed to the common case of personal service upon individuals; and my own opinion is, that the 8th section is exclusively directed to service upon persons who represent corporate bodies *in Ireland*, for, I find that the proviso requires notice in the *Dublin* Gazette and in a *local* newspaper, and it would be manifestly absurd to require a notice of that sort in the case of bodies corporate elsewhere than in Ireland. I cannot think it was intended by the legislature to do so nugatory a thing as to require a notice to be given in the Dublin Gazette, which probably has no circulation out of Ireland, or in a local Irish newspaper, for the purpose of informing an English corporation that a writ has been issued against them by an Irish court. My impression is, that the 9th section was intended to meet this very case; for, it enables the court or a judge to authorize such substitution of service as to them or him shall seem fit, where it is made to appear to their or his satisfaction that *any defendant* has not been personally served with any writ of summons, and has not according to the exigency thereof appeared to the action, and that due and proper means were used to serve such writ, or that such defendant resides out of the jurisdiction of the court, and can be properly served through or upon any agent or representative or any manager of the real or personal estate of such defendant within such jurisdiction, or has removed to avoid service, or on any other good and sufficient grounds. If I were to take upon myself to decide as to the regularity or irregularity of the proceedings in the Irish court, I should incline to think that they were perfectly regular. But I am of opinion *that we have nothing to do with that. It is, and of necessity must be, incident to every court itself to decide as to the regularity of its own procedure. [*618 If, indeed, the proceeding is such as to be repugnant to natural justice, another principle supervenes, and the court whose aid is invoked to enforce it may decline to grant it, and may declare the whole to be void. To say that the proceeding here was contrary to natural justice, appears to me to be absurd; for, the court seem to have taken especial care that the process should come to the knowledge of the defendants before they allowed the appearance to be entered; having not only directed that the process should be served upon their agent in Dublin, but also that it should be transmitted to their London agent, through the general post-office. I entirely agree with what is said in the judgment of the Court of Common Pleas, that what was done here, if objectionable at all, amounts only to an irregularity, and cannot affect the validity of the judgment. I found my opinion upon what has fallen from the rest of the court; but, further, I think the proceedings in the Irish court were perfectly regular.

WATSON, B.—I entirely concur in the judgment pronounced by my Brother Martin. The action being brought upon the judgment of a court of competent jurisdiction, it was incumbent on the defendant to

show that the proceeding which led to that judgment was without jurisdiction. If it could be shown that the whole proceeding was contrary to natural justice, we should be bound to give effect to the objection. But it seems to me that the utmost that could be said here is, that there has been an irregularity. But I found my judgment on this,—that the 7th and 8th section of the 13 & 14 Vict. c. 18 point out the mode of procedure *by the plaintiff;* and that the 9th section provides that
*619] *the court may order substituted service, in certain specified cases, "or on any other good and sufficient grounds," through the post-office,—which most emphatically extends to a mode of service on persons residing out of Ireland,—or in such other manner as they may think fit. And I cannot see why, when the interpretation clause (s. 51) has said that the words "*party*" and "person" shall extend to and include any corporation or other public body, the word "defendant" should not also include a corporation, being defendant. The 9th section was meant as a general provision applicable to all cases where the defendant cannot be found or avoids service, or on any other grounds which the court or judge may deem sufficient. It seems to me that the court on this occasion acted carefully and strictly within the statute, and that the proceedings were perfectly regular. For these reasons, I think that the judgment of the court below must be affirmed.

Judgment affirmed.(a)

(a) See a full discussion of this subject in the American note to Crepps v. Durden, 1 Smith's Lead. Cases 833; 5th Am. Ed.

END OF MICHAELMAS TERM.

*620] *REGULA GENERALIS.

Declaring on writs under the Bills of Exchange Act, 1855.

WHEREAS, by the rule of Michaelmas Term, 1855,(a) with respect to endorsements on writs under the Bills of Exchange Act, 1855, it was, amongst other things, ordered "that no other claim than a claim on a bill of exchange or promissory note should be included in writs under the Summary Procedure on Bills of Exchange Act, 1855:" And whereas it is expedient that the said rule should be explained and amended: It is hereby ordered, that, where a defendant obtains leave to appear according to the said act, and enters [an] appearance to any such writ, according to the said rule of Michaelmas Term, 1855, the plaintiff may include in his declaration, together with a count on the bill of exchange or promissory note (as the case may be), a count upon the consideration, if any, between the plaintiff and defendant, and deliver a particular of demand accordingly.

CAMPBELL.	SAMUEL MARTIN.
A. E. COCKBURN.	R. B. CROWDER.
FRED. POLLOCK.	J. S. WILLES.
J. T. COLERIDGE.	G. BRAMWELL.
W. WIGHTMAN.	W. H. WATSON.
W. ERLE.	W. F. CHANNELL.
E. V. WILLIAMS.	J. BARNARD BYLES.

Jan. 30, 1858.

(a) See 17 C. B. 2.

CASES

ARGUED AND DECIDED

IN THE

COURT OF COMMON PLEAS,

IN

Hilary Term,

IN THE

TWENTY-FIRST YEAR OF THE REIGN OF VICTORIA. 1858.

The Judges who usually sat in banco in this Term, were,—
COCKBURN, C. J., WILLIAMS, J., CROWDER, J., AND BYLES, J.

MEMORANDA.

ON the first day of this Term, the following members of the College of Doctors of Law, who had been appointed Her Majesty's Counsel learned in the Law, were called within the Bar:—Dr. Adams, Dr. Phillimore, Dr. Deane, and Dr. Twiss.

Monday, the 25th of January, being the day of the celebration of the marriage of the Princess Royal of England with Prince Frederick William of Prussia, was observed as a holiday in all the courts.

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*PRITCHARD *v.* THE MERCHANT'S AND TRADESMAN'S MUTUAL LIFE ASSURANCE SOCIETY. [*622

A policy was effected, in the usual form, on the life of A., in consideration of the payment of certain annual premiums on the 13th of October in each year,—with a condition that the policy should be void, amongst other grounds, "if the premiums were not paid within *thirty days* after they should respectively become due; but that the policy might be revived within three calendar months, on satisfactory proof of the health of the party on whose life the insurance was made," and payment of a certain fine.

An annual premium *became due on the 13th of October*, 1855. The *thirty days* allowed by the condition for payment of the premium *expired on the 12th of November,—on which day A. died.* On the 14th of November, the plaintiff (for whose benefit the policy was effected) sent

the company a check for the premium, for which they on the following day obtained the cash, giving a receipt as for "*the premium for the reward of the policy to October 13th, 1856, inclusive,*"—both parties being ignorant that A. was then dead:—Held, that the payment did not under the circumstances revive the policy.

And *semble*, that, the contract being for payment of the sum insured on the *future* event of the death of A., a payment of the premium *within the thirty days*, but *after A.'s death*, would not be a payment within the condition.

THE declaration stated, that, by a policy of assurance numbered 954, bearing date the 13th of October, 1853, under the hand and seal of the United Mutual Mining and General Life Assurance Society, and of three of the directors thereof, and under the hand of the plaintiff, then being the resident director of the said society, and which society then being a joint stock company duly and completely registered under the provisions of the Joint Stock Companies Act, 7 & 8 Vict. c. 110,—reciting that Sir George Back, R. N., Martin Stutely, and Wilbraham Taylor, had proposed and agreed to effect an assurance with the said society in the sum of 2000*l.* upon the life of Richard Paul Hase Jodrell, and that the said assured had paid at the office of the said society the sum of 91*l.* 15*s.* as a premium for twelve calendar months, commencing on the day of the date of the said policy, it was witnessed, that, if the said R. P. H. Jodrell should die at any time within the said term of twelve calendar months, to be computed from the day next before the day of the date of the said policy, or if he should survive the said term, and the said assured, their executors, administrators, or assigns, should pay or cause to be paid at the office of the said society the like premium as aforesaid on or before the 13th day of October then next, and at the expiration *623] *of every subsequent twelve calendar months during the life of the said R. P. H. Jodrell, then the funds and property of the said society, according to the deed of settlement thereof, should be liable, within three calendar months after proof satisfactory to the directors should have been received at the office of the said society of the death of the said R. P. H. Jodrell, to pay unto the said Sir G. Back, M. Stutely, and W. Taylor, or to their executors, administrators, or assigns, the said sum of 2000*l.* thereby assured: That the said R. P. H. Jodrell survived the said term, and the said Sir G. Back, M. Stutely, and W. Taylor paid at the office of the said society the like premium as aforesaid, to wit, the sum of 91*l.* 15*s.*, on the 13th day of October then next, to wit, on the 13th of October, 1854, and also the like premium as aforesaid, to wit, the sum of 91*l.* 15*s.*, at the expiration of the subsequent twelve calendar months, to wit, on the 13th of October, 1855, as and for the annual premiums upon and for the renewal of the said policy: That the defendants, on the 11th of November, 1853, by a policy of insurance then made between them and the plaintiff as agent for and on behalf and for the benefit of the said United Mutual Mining and General Life Assurance Society,—the said plaintiff being then a shareholder and an assured member and the resident director of the said United Mutual Mining and General Life Assurance Society, and having an interest to the extent of 500*l.* and upwards in the life of the said R. P. H. Jodrell, and the said United Mutual Mining and General Life Assurance Society having an interest in the life of the said R. P. H. Jodrell in respect of and to the amount of the policy of insurance first hereinbefore mentioned and recited,—assured to the plaintiff the sum of 500*l.* to be paid on the death of the said R. P. H. Jodrell; which said last-mentioned policy of assur-

ance was and is in the words and figures *following, that is to say,—"The Merchant's and Tradesman's Mutual Life Assurance [*624
Society, No. 5, Chatham Place, Blackfriars, London. No. U X 2245. Premium, 4*l.* 11*s.* 9*d.* per cent. per annum. Sum assured, 500*l.* Premium, 22*l.* 18*s.* 9*d.* Whereas Thomas Pritchard, on behalf of the trustees of The United Mutual Mining and General Life Assurance Society, of 54 Charing-Cross, London, having an interest in the life of R. P. H. Jodrell, of, &c., hath agreed to open a policy of assurance with The Merchant's and Tradesman's Mutual Life Assurance Society, subject to the conditions of the deed of settlement of the society bearing date the 9th day of March, 1847, and hath made a certain declaration in writing, bearing date the 6th day of October last, touching the age, state of health, and other circumstances attending the said R. P. H. Jodrell, which it hath been agreed shall form the basis of the contract between the said Thomas Pritchard and the society: And whereas the said society have agreed to assure to the said Thomas Pritchard the sum of 500*l.* to be paid to the said trustees, their executors, administrators, or assigns, within three months after the decease of the said R. P. H. Jodrell, at the annual premium of 22*l.* 18*s.* 9*d.*; and the said Thomas Pritchard hath paid the sum of 22*l.* 18*s.* 9*d.* until the 13th day of October now next ensuing, and hath agreed to execute the said deed of settlement, or some deed of covenant in conformity thereto, when he shall be required so to do, and hath also agreed to pay the annual premium of 22*l.* 18*s.* 9*d.* on the 13th day of October in every succeeding year: Now, we whose names are hereunto subscribed, being three of the directors of the said society, do, for ourselves and our assigns, covenant, promise, and agree with the said assured, and the executors, administrators, and assigns of the assured, that, if the said R. P. H. Jodrell shall die on or before the said *13th day of October next ensuing the day of the date of these [*625
presents, or if he shall live beyond that period, and the said assured, or the assigns of the said assured, shall on or before the 13th day of October now next, and afterwards upon or before the 13th day of October in every succeeding year *during the natural life of the said R. P. H. Jodrell*, pay to the directors of the said society, at the office of the said society, the like annual premium of 22*l.* 18*s.* 9*d.*, and if the said assured, or the assigns of the said assured, shall and do during the continuance of this assurance, well and truly observe, perform, fulfil, and keep all and singular the covenants, conditions, and agreements contained in the said deed of settlement which on the part of the said assured are and ought to be observed, performed, fulfilled, and kept, and all such orders, rules, and regulations as since the date hereof have been or shall hereafter be made at any general court of the said society to explain, amend, alter, correct, extend, add to, or vary the same in any manner howsoever, according to the true intent and meaning thereof, and also execute the said deed of settlement, or deed of covenant, within the time in that behalf aforesaid, if required so to do, We, or the directors of the said society for the time being, will or shall within three calendar months next after satisfactory proof shall have been made, according to the rules and practice of the said society, of the death of the said R. P. H. Jodrell, well and truly pay or cause to be paid, out of the funds of the said society, unto the said assured, their executors, administrators, and assigns, the full sum of 500*l.* so hereby assured: Provided always, that no personal liability shall attach to us, the directors executing this policy, nor

to the members at large of this society respectively; and that the assurance hereby granted shall at all times be subject to the terms and conditions printed on the back of this *policy, and to the stipulations of the said deed of settlement. (Signed by three of the directors.) Condition of life assurance. This policy will become void, and all moneys paid on account thereof to the society become forfeited to the said society, in any one of the events mentioned in the next following clauses Nos. 1, 2, 3, 4, and 5 respectively,—1. If the within-mentioned declaration contain any untrue averment, or withhold any circumstances touching the party on whose life the assurance is made, with which the directors ought to be made acquainted,—2. *If the premiums be not paid within* the number of days next hereinafter limited after they become due respectively, that is to say, yearly premiums within *thirty days*, half-yearly premiums within fifteen days, quarterly premiums within seven days: but this policy may be revived within three calendar months, on satisfactory proof of the health of the party on whose life the assurance is made, and the payment of a fine of 2*s.* 6*d.* per cent. upon the sum assured; or within six calendar months, on payment of 5*s.* per cent.; or within twelve months on such satisfactory proof being given, and payment of such fine as the directors may think fit to impose,—3. If the party on whose life the assurance is made shall die by duelling, by his own hand, or by the hands of justice,—except to the extent of any bonâ fide interest vested in any other person or persons under an assignment by deed for a valuable consideration in money, or by way of security or indemnity, or legal or equitable lien,—and except in so far as the directors may, under the authority vested in them, think proper to return any part of the premiums that may have been paid, not exceeding the value of the policy,—4. If the party on whose life the assurance is made shall proceed to parts beyond the seas, save and except within the limits and on the conditions hereinafter prescribed,—5. If the party on whose life the assurance is made shall die in *consequence of having been employed in actual service in any military or naval capacity, or, being or becoming a seafaring person, shall go upon the sea in course of his occupation, save and except upon the conditions hereinafter prescribed. But the policy will not become void or forfeited, in the following events, —1st. If the party on whose life the assurance is effected (not being a naval, military, or seafaring person on duty) shall proceed to or from any part of the same hemisphere, not being in a state of war, civil war, tumult, or pestilence, distant more than thirty-four degrees from the equator: 2d. If the party on whose life the assurance is made shall depart beyond the limits mentioned in the last proviso or condition, or proceed to such parts of the world as are in a state of war, tumult, or pestilence, or, being a military, naval, or seafaring person, shall enter into active service, and the party effecting the insurance shall within three calendar months after such contraction give notice thereof at the office of the society, and pay such premiums as the directors shall think commensurate with the extra risk, or, in lieu thereof, shall at any time previous to such departure sign a memorandum to be written on this policy, to the effect, that, when the assurance shall become a claim, such extra premium as would have been paid during the period of engagement in active service or residence in foreign parts, as well as sea risk, with interest at 5*l.* per cent. per annum, shall be deducted from the amount

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assured. Memorandum: It is hereby agreed that the within policy shall be subject to the same conditions as those set forth in the policy of The United Mutual Mining and General Life Assurance Society, numbered 954, and dated October 13th, 1853; to the intent that the liability of the assurers shall be precisely the same as that of the said society, to the extent of the sum hereby assured." Averment, that the said R. P. H. Jodrell lived beyond the said 13th day of October next *ensuing the date of the policy of assurance last above recited, and the [*628 plaintiff, within thirty days after the premium became due, to wit, on the 7th day of November, 1854, paid to the directors of the said Merchant's and Tradesman's Mutual Life Assurance Society, at the office of the said society, the like annual premium of 22*l.* 18*s.* 9*d.*; and the plaintiff afterwards, in the next succeeding year during the life of the said R. P. H. Jodrell, and within thirty days after the premium became due, to wit, on the 8th of November, 1855, obtained from the directors of the said United Mutual Mining and General Life Assurance Society, a banker's check drawn by three of the directors of the said United Mutual Mining and General Life Assurance Society, upon the London and Westminster Bank, St. James's Square, in favour of the defendants, for the sum of 22*l.* 18*s.* 9*d.*, and the said check was afterwards, *on the 14th day of November*, 1855, and before notice to the plaintiff, or to the said United Mutual Mining and General Life Assurance Society, of the death of the said R. P. H. Jodrell, delivered to and received by the defendants as and for and on account of the yearly premium of 22*l.* 18*s.* 9*d.* on the said last-mentioned policy of assurance due on the 13th of October, 1855; and the said check was afterwards presented by the defendants at the London and Westminster Bank, and duly honoured; and the defendants afterwards, on the 15th of November in the year last aforesaid, delivered at the office of the said United Mutual Mining and General Life Assurance Society a receipt in the words and figures following, that is to say, —"Merchant's and Tradesman's Mutual Life Assurance Society. Head Office, Cannon Street, London Bridge. Receipt No. 5770. Policy U X 2245, dated November 11th, 1853. Sum assured, 500*l.* Premium, 22*l.* 18*s.* 9*d.* Received, the 15th day of November, 1855, from the United Mutual Life Company the sum of twenty-two pounds, *eighteen shillings, and nine pence, *being the premium for the renewal of* [*629 *policy to October 13th*, 1856, *inclusive*, dated and numbered as above. George Thompson, Manager, T. Musgrave, Secretary:" That the said policy made by the defendants was, within three calendar months after the premium became due in manner and form aforesaid, renewed and revived by them to the 13th day of October, 1856, without requiring proof of the health of the said R. P. H. Jodrell, and without payment of any fine; and that the defendants dispensed and waived such proof and payment: That the said R. P. H. Jodrell died before the 13th day of October, 1856, to wit, *on the 12th day of November*, 1855, and did not die by duelling, by his own hand, or by the hands of justice, and did not proceed to parts beyond the seas, save and except within the limits and on the conditions prescribed in the said policy, and did not die in consequence of having been employed in actual service in any military or naval capacity, and was not and did not become a seafaring person: That, although, more than three calendar months before the commencement of this suit, the defendants had notice of the death of the said R.

P. H. Jodrell; and although the plaintiff and the said United Mutual Mining and General Life Assurance Society were, and each of them was, ready and willing to make satisfactory proof, according to the rules and practice of the defendants, of the death of the said R. P. H. Jodrell; and although a reasonable time had more than three calendar months before the commencement of this suit elapsed for requiring such proof; and although the defendants did not require the same, and admitted the fact of the death of the said R. P. H. Jodrell; and although the declaration of the plaintiff in the said policy of assurance mentioned did not contain any untrue averment by the plaintiff, or withhold any circum-
*630] stance touching the *party on whose life the assurance was made, with which the directors ought to have been made acquainted; and although the plaintiff and the said United Mutual Mining and General Life Assurance Society had, and each of them had, always from the time of the making by the defendants of the said policy of insurance performed and fulfilled all things on his or their part to be performed and fulfilled; and although the said United Mutual Mining and General Life Assurance Society had become liable to pay and had paid the sum of 2000*l.* under and by virtue of the said policy of assurance in this declaration first above mentioned; and although the funds of the said Merchant's and Tradesman's Mutual Life Assurance Society had been and still were sufficient to pay the said sum of 500*l.* on the said policy of assurance,—of all which premises the defendants had notice; yet neither the defendants nor the said parties whose names were affixed to the said policy, nor the directors for the time being of the said Merchant's and Tradesman's Mutual Life Assurance Society had, nor had any or either of them, paid the said sum of 500*l.*, or any part thereof.

The declaration also contained a count for interest.

Second plea, to the first count,—that the said R. P. H. Jodrell died before the expiration of thirty days after the 13th of October, 1855, to wit, on the 12th of November in that year, and before the said check was delivered to and received by the defendants, and before the said policy was renewed or revived as alleged; and that, at the time of the said delivery to or receipt by them of the said check, or of their presenting the same for payment, or of its being honoured, or of their said delivering the said receipt, or of their said renewing and reviving the said policy, or of their said waiving or dispensing with such proof and payment, as in the first count alleged, the defendants had not any notice,
*631] *knowledge, or information whatever of the said R. P. H. Jodrell being dead; and they received the said check, and presented it for payment, and received payment of the same, and delivered the said receipt, and made the said renewal and revivor, and waived and dispensed with such proof and payment, under the bonâ fide but mistaken supposition and belief, and did then really suppose and believe, that the said R. P. H. Jodrell was then alive; and the defendants, on knowing the fact of his being dead, and within a reasonable time after they first had such knowledge, repudiated the said policy, and all liability thereunder, and tendered and offered the plaintiff to pay to him the said 22*l.* 18*s.* 9*d.*, being the amount of the money paid on the said honouring of the said check: and that, at the time of the delivery to and receipt by the defendants of the said check, the said R. P. H. Jodrell was dead, and *that the said check was not delivered to or received by them until after the expira-*

tion of thirty days after the 13th of October, 1855; and that the said annual premium upon the said policy of 22*l.* 18*s.* 9*d.*, which became payable on the 13th of October, 1855, was not paid according to the terms of the said policy, or the provisions or conditions thereon endorsed, during the natural life of the said R. P. H. Jodrell, or on or before or within thirty days after the said 13th of October, 1855.

To this plea the plaintiff demurred, the ground of demurrer stated in the margin being, "that the death of the assured, as alleged in the plea, is no answer to the plaintiff's claim on the policy, which was renewed and revived as in the declaration mentioned; and that the plea, although it confesses, does not avoid the cause of action alleged in the declaration."

John Gray (with whom was *J. E. Davis*), in support *of the demurrer.(a)—The question is, what is the effect of a payment [*632 and acceptance of premium after the expiration of the thirty days allowed by the second condition. It appears that a check was drawn for the amount of the premium within the thirty days, but not paid over to the defendants until after the thirty days had expired: and that, unknown to either party, the person insured had died within that period. The dates are material. The premium was payable on the 13th of October, 1856; the thirty days allowed by the condition expired on the 12th of November, on which day Jodrell, the party insured, died; a check for the amount of the premium was *drawn* on the 8th of November, but it was not actually handed over to the defendants until the 15th. It is clear, that, in an *ordinary case, if, after the expiration of the thirty days, proof [*633 were given (under the 2d condition) of the health of the party on whose life the assurance was effected, and the 2*s.* 6*d.* per cent. paid and accepted, it would have continued the policy. Now, it was competent to the society to waive such proof; and that is alleged and admitted on this record. The question, then, is reduced to this,—is the waiver to be of no effect, because, unknown to either party, the life had already dropped? [CROWDER, J.—In that case the parties would not be contracting with reference to a living man.] The society require nothing in the shape of a warranty that the man is living. The case of The Earl of March *v.* Pigot, 5 Burr. 2802, is very much in point. The wager there was originally proposed between young Mr. Pigot, the defendant, and young Mr. Codrington, to run their fathers (to use the Newmarket phrase) against each other. Sir William Codrington,

(a) The points marked for argument on the part of the plaintiff, were as follows:—

"That the death of the assured as alleged in the plea, is no answer to the plaintiff's claim on the policy; and that, upon the renewal and revival of the policy as mentioned in the declaration, and admitted by the plea, the policy was in as full force and effect as if the renewal premium had been actually paid upon or before the 13th of October, 1855.

"That the defendants are estopped from saying that the payment of the premium as alleged in the declaration was not a renewal and revival of the policy from the 13th of October, 1855, to the 13th of October, 1856:

"That a contract by way of assurance made on the 15th of November, 1855, to pay the plaintiff 500*l.* in the event of the death of the third person before the 13th of October, 1856, was a good and valid contract in law, notwithstanding the death of the assured before the 15th of November, 1855, without notice to the plaintiff; the plaintiff being interested in the life of the assured; and the contract not being a wagering policy or otherwise void under the statute 14 G. 3, c. 48:

"And that the allegation in the plea, of a tender or offer by the defendants to repay the premium after the renewal and revival of the policy, should have also averred that the defendants always were and still are ready to pay the same to the plaintiff."

the father of Mr. Codrington, was then a little turned of fifty: Mr. Pigot's father was upwards of seventy. Lord Ossory computed the chances, according to the above-mentioned ages of their respective fathers. Mr. Codrington thought the computation was made too much in his disfavour; whereupon Lord March agreed to stand in Mr. Codrington's place: reciprocal notes were accordingly given between the Earl and Mr. Pigot. Mr. Pigot's note ran thus,—"I promise to pay to the Earl of March 500 guineas, if my father dies before Sir W. Codrington. W. Pigot:" the Earl's was,—"I promise to pay to Mr. Pigot 1600 guineas, in case Sir W. Codrington does not survive Mr. Pigot's father. March." No mention was made, at the time of this transaction, about their fathers being then dead or alive: but the fact was, that Mr. Pigot's father was then actually dead; he having died in Shropshire, one hundred and fifty miles from London, at 2 o'clock in the morning of the same day on which the bet was *made at Newmarket, after dinner. This fact, however, was not then known to any of the parties: nor was there any reason for suspecting that Mr. Pigot's father was then dead. On the part of the defendant, it was objected, that the contract was void, as being without consideration, for, his father being then already dead, there was no possibility of his winning; and that it was a contract in futuro, manifestly made upon the supposition of a *then future* contingency. The jury having found for the plaintiff, upon a rule for a new trial, it was insisted, on the part of the plaintiff, that the event of either of the two fathers being then already dead did not occur to the parties; that, if it had, it would not have varied the bet: and that retrospect was included as well as futurity; to which it was answered, on behalf of the defendant, that, by the law of England, it is necessary to insert the words "lost or not lost" in ship-policies, otherwise the insurance is void if the ship was then already lost; that the bet in question went upon the idea that both fathers were then living; and the case of the Mills Frigate was referred to, which was an insurance upon a ship which had a latent defect wholly unknown to the parties, and the insurers were held not liable, upon account of the ship's not being seaworthy, though such defect was not known. Lord Mansfield said: "I differ totally in opinion from that doctrine. The determination in that case (which was made by my Lord Chief Justice Wilmot and me, to whom it was referred), was made quite upon another ground: and the change of opinion in the Court of Common Pleas happened upon the citing of two cases that had been determined before me; which cases were mistaken. The insured ought to know whether his ship was seaworthy or not at the time when she set out upon her voyage: but, how should he know the condition she might be in after she had been out a twelvemonth? The question is, what the parties really meant. The material contingency was, which of these two young heirs should come to his father's estate first. It was not known that the father of either of them was then dead. Their lives, their healths, were neither warranted nor excepted. It was equal to both of them whether one of their fathers should be then sick or dead. All the circumstances show, that, if it had been then thought of, it would not have made any difference in the bet: and there was no reason to presume that they would have excepted it. The intention was, that he who came first to his estate should pay this sum of money to the other, who stood

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in need of it. That the event *had* happened, was in the contemplation of neither party. Both notes are so penned as to be applied to what was to happen. But the nature of such a contract, and the manifest intention of the parties, support the verdict of the jury, that he who succeeded to his estate first, by the death of his father, should pay to the other, without any distinction whether the event had or had not at that time actually happened." And Aston, J., said: "It was originally intended to be a bet between two young heirs apparent: and the material point to be settled, was, to fix the difference of the chances of the survivorship of their fathers. The mere survivorship was the thing intended to be betted upon." [WILLIAMS, J.—That case is not very accurately reported: one part of Lord Mansfield's judgment is somewhat obscure.] In Mead *v.* Davison, 3 Ad. & E. 303 (E. C. L. R. vol. 30), 4 N. & M. 701 (E. C. L. R. vol. 30), which was an action on a policy of insurance on a ship "lost or not lost," Lord Denman, in delivering the judgment of the court, says,—"The case of The Earl of March *v.* Pigot, referred to in the argument, is a direct authority in principle in favour of the right to recover, if the loss was known to neither party at the time of effecting the policy. According to the *same case, and, indeed, on the plainest general principles, if the loss had been known to the assured only, the policy would be void. But no case has determined that an underwriter who chooses to effect a policy, with full knowledge that the loss has actually happened, may not be bound by it. His conduct might, indeed, appear extraordinary, if it were not clear that he had a good legal consideration for entering into the contract, viz., the payment of the premium, which may be regarded as a price actually given and received for the underwriter's indemnity against the contingency that has arisen." [WILLES, J., referred to Sutherland *v.* Pratt, 11 M. & W. 296.†] In Phillips on Insurance, 3d edit. Vol. I., p. 501, § 925, it is said: "The risk may be assumed by the underwriters for an anterior period, and cover losses prior to the date of the policy, provided there is no concealment or misrepresentation by either party. For this purpose, the clause 'lost or not lost' is introduced. But this clause is not necessary: it is sufficient if it appear by the description of the risk, and the subject of the contract, that the policy is intended to cover previous losses." [WILLIAMS, J.—Sir B. Shower, in his argument in Jefferyes *v.* Legendra, 1 Show. 320, 324,(*a*) says: "Policies are to have a reasonable intendment: so, if the ship or goods were lost before the policy was made, and the party insured had notice, though the words 'lost or not lost' be inserted, yet the policy is void. If general, without these words, yet, if lost before the policy made, it is void, because of the improbability supposed that any man would engage against that which has already happened." For this is vouched the authority of a Genoese jurist, Straacha de Mercatura, 143, 222.] The receipt of the premium after the expiration of the thirty days does not operate the creation *of a new policy, but is a mere waiver of a forfeiture, and an adoption of the payment as if made in due time. The distinction, therefore, of "lost or not lost," has no bearing on this case. [WILLES, J.—You say that the payment on the 15th of November had

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(*a*) S. C. 3 Lev. 320, 4 Mod. 58, Carth. 216, Holt 465 (E. C. L. R. vol. 3).

a retrospective effect. Is not that contradictory to the terms of the receipt, which is stated to be for a "renewal" of the policy,—pointing to the future?] It is the ordinary form of receipt in use: the same that would have been given if the payment had taken place within the thirty days, and in the lifetime of the party. [CROWDER, J.—Would an original policy have been good, the party being dead at the time the insurance was effected? Would not that be within the case of Coutourier v. Hastie, 5 House of Lords Cases 673?(a) Was not this a receipt of money in ignorance of facts which, if known, would have prevented the parties from accepting the payment?] *This is not like the case of an action to recover back money which has been paid under a mistake of fact. If a man enters into a contract under a mistake, that mistake will not absolve him from the performance of his contract. Here the payment was to cover the risk from the 13th of October, 1855, to the 13th of October, 1856. [CROWDER, J.—But the man was dead when the transaction took place.] So he was in the case of The Earl of March v. Pigot. [CROWDER, J.—That is a totally different matter.] The effect of the payment and receipt of the premium here was, to make the policy as valid and efficacious as if the money had been paid in due time.

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Hawkins (with whom was *J. A. Foot*), contrà.(b)—The second plea is a good answer to the action. The plain and obvious intention of the contract between the parties, was, that any renewal of the policy under the second condition should take place only during the natural life of the assured. By the terms of the policy, the first premium which was paid was for the assurance of the life of Jodrell for twelve months, "to be computed from the day next before the date of the policy," and the future payments were to be made on or before *the 13th of October then next (1854), and "at the expiration of every subsequent twelve calendar months during the life of Jodrell. Thirty days are allowed for payment of the premium: but this must be taken in conjunction with the policy itself, and must be understood to mean, pro-

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(a) And see Coutourier v. Hastie, 8 Exch. 40,† and Hastie v. Coutourier (in Cam. Scac.), 9 Exch. 102.† There, a cargo of corn was shipped by A. at Salonica, in February, 1848, for delivery in London. On the 15th of May, it was sold by Hastie, a factor, who made the sale on a del credere commission. The contract described the corn as "of average quality when shipped," and the sale was made at "27s. per quarter, free on board, and including freight and insurance to a safe port in the United Kingdom, payment at, &c., upon handing shipping documents." In fact the corn had been sold at Tunis, a short time before the date of the contract, in consequence of getting so heated in the early part of the voyage as to render its being brought to England impossible. The contract in England was entered into in ignorance of this fact. When the English purchaser discovered it, he repudiated the contract. In an action brought against the factor (by his principals) for the price, it was held by the House of Lords that the contract contemplated that there was an existing something to be sold and bought, and capable of transfer, which not being the case at the time of the sale by the factor, he was not liable.

(b) The points marked for argument on the part of the defendants, were,—

"That the second plea was good in substance,—that the death of the assured, as alleged therein, was an answer to the plaintiff's claim on the policy, notwithstanding it was renewed as in the declaration alleged,—that the plea avoided the cause of action alleged in the declaration,—that, the check not having been delivered until after the expiration of the thirty days allowed for paying the premium and keeping the policy on foot, and the defendants having received it and got it cashed under the bonâ fide belief that Jodrell was alive, and offering to return the money in a reasonable time after the discovery of his death, was a good defence to the action."

vided the assured be still living. This is clear from the subsequent clause of the second condition, which provides, that, if the premium be not paid within the thirty days, the policy may be renewed within a limited time, upon certain terms, viz. "on satisfactory proof of the health of the party on whose life the assurance is made, and the payment of a fine of 2*s.* 6*d.* per cent." Suppose Mr. Jodrell had died on the 13th of October, and before the payment of the premium for the ensuing year, and, after his death, in ignorance of the fact, Pritchard had paid and the company had received the premium for renewal,—what would have been the position of the defendants? Could it be said that that was a payment within the terms of the policy? The thirty days' indulgence clearly do not give the party any greater privileges than he would have had if the premium was paid on the day on which it actually became due. If the assured could not have made the payment on the 13th of October, à fortiori he could not have done so within the thirty days. That was decided by this court in the recent case of Simpson *v.* The Accidental Death Company, 2 C. B. N. S. 257 (E. C. L. R. vol. 89). Here, the fact of the party being alive is a condition precedent to the policy's being revived by the payment of the premium and fine. [He was stopped by the court.]

Gray, in reply.—Simpson *v.* The Accidental Death Company is very distinguishable from the present case: the insurance against accident must necessarily be made by the party himself; the very nature of the *contract excludes payment by his executors. The company having received the premium for the renewal of the policy here, it is the same as if they had received it within the days of grace. [CROWDER, J.—You must not assume that a payment *within* the thirty days, the life having dropped in the interim, would sustain the policy.] That the assured should be living at the time the payment takes place, cannot be a condition precedent to the validity of the policy, provided the payment is made within the time prescribed by the policy, or within the extended period given by the conditions. [*640

WILLIAMS, J.—I am of opinion that our judgment must be for the defendants. Looking at the facts as they appear upon the pleadings, it is clear to my mind that the payment of the renewal premium was made by the plaintiff and accepted by the defendants, not on any new contract, but by way of indulgence under the contract contained in the original policy. Looking at the policy and the conditions annexed to it, I cannot entertain a doubt that the premium was paid and accepted upon an implied understanding on both sides that the party insured was then alive. Both parties were labouring under a mistake, and consequently the transaction was altogether void. We were much pressed during the argument with the case of The Earl of March *v.* Pigot, where it was held that a wager upon the life of an individual was good, notwithstanding the life had already dropped at the time the wager was made. But, when closely looked at, it will be found that that case has no bearing whatever upon the present. It appears from the report that the wager made between the plaintiff and defendant was, that the latter should pay to the former 500 guineas if the father of the latter should die before a gentleman named: and the question was, whether the wager was avoided by the fact (unknown to *both parties at the time of the wager) of the defendant's father being actually dead at that [*641

time. Lord Mansfield,—no objection being made to that course being taken,—left it to the jury to say what was the understanding of the parties as to the terms of the wager: and the jury appear to have come to the conclusion that it would have made no difference whether the event had then actually taken place or not, and that it was in truth a mere wager as to which of the two originally named parties should first come to his inheritance,—the subject-matter of the bet being the mere survivorship of the respective parents. It was impossible to draw any such inference as to the meaning of the parties here. It cannot for a moment be doubted, that, if the defendants had known of the death of Jodrell at the time the premium was tendered, they would have refused to accept it. The whole transaction,—the payment and the receipt of the money,—was founded upon a mistake.

CROWDER, J.—I also am of opinion that the defendants are entitled to judgment on this demurrer. The plea sets up a state of things which appears to me to be an answer to the action. It is clear that the policy, which was to enure from the 13th of October, 1854, to the 13th of October, 1855, had expired, together with the thirty additional days allowed by the condition for the payment of the premium for its continuance; and that the assured died before the payment was made and the receipt given. It is contended on the part of the plaintiff that an intention is manifested by the receipt that there was to be a renewed insurance from the by-gone 13th of October till the 13th of October in the following year, without any reference to whether the party was dead or alive at the time the payment was made. Looking at the whole
*642] scope of the *instrument, I cannot comprehend what grounds there are for supposing that any such intention could exist. As to the case of The Earl of March *v.* Pigot, it seems to me to be an authority directly in point against the plaintiff: for, it is stated by Lord Mansfield, and found by the jury, that the making of the bet would not have been influenced by the consideration of whether the event had or had not actually happened at the time. It could not be (and in fact it was not) contended here that the death was an unimportant circumstance. Looking at the character of the second condition, making the policy void if the premiums be not paid within the number of days therein limited after they become due respectively, and stipulating that the policy may be revived within three months, *on satisfactory proof of the health of the party on whose life the assurance is made*,—it is manifest that it was of the essence of the contract that the party should be alive and in good health at the time of such revival. It is said, however, that the company waived such proof, and are therefore bound by their contract as if such proof had actually been given. I cannot, however, assent to that proposition. The common sense of the thing is, that the whole transaction was a mistake.

WILLES, J.—I also am of opinion that the defendants are entitled to judgment on this demurrer. Taking the policy without the conditions, it is clear that the plaintiff could have no claim whatever against the company thereon after the 13th of October, 1854, unless he duly paid the premium for each ensuing year on or before that day. Then comes a condition (the second), which provides that the policy shall become void, if the (yearly) premiums be not paid within thirty days after they become due respectively. Stopping there, it might be a question,—and

it is one which persons insured would *be wise not to raise,— [*643
whether this does not contemplate a payment by the assured himself; or whether, as has been contended on the part of the plaintiff, the effect of this condition is absolutely to extend the period for the payment of the premium, so that, if the assured should die within the thirty days, the company are still bound to accept the money, such payment to all intents and purposes enuring as a payment within the time limited by the policy, so as to entitle the representatives of the assured to recover upon the policy, even though the assured should be dead at the time the premium was paid. The inclination of my opinion,—if it be necessary to express one, and perhaps it is, for it has an important bearing on the case,—is, that the thirty days are given only with reference to insurance for future years, and that, notwithstanding the life has become less valuable, the company are bound to go on insuring future years provided the future premiums are paid within thirty days after the expiration of each period of insurance. However that may be, the payment here was not made within the thirty days. But then comes this further condition,—"but this policy may be revived within three calendar months, *on satisfactory proof of the health of the party on whose life the assurance is made*, and the payment of a fine of 2*s.* 6*d.* per cent. upon the sum assured," &c. I am at a loss to see how that provision aids the plaintiff's case. It assumes that the subject upon which the insurance is to attach is a living person, otherwise the stipulation for satisfactory proof of health would be idle and absurd. The very foundation of a life policy, as explained by the Exchequer Chamber in Dalby *v.* The India and London Life Assurance Company, 15 C. B. 365 (E. C. L. R. vol. 80), is, that it is a contract for the payment of a certain sum upon the future death of a person then in being, in consideration of the present payment of a premium. The *renewals, like the original policy, [*644
clearly are only for the future assurance of a living person. Then it is said, that, by accepting the premium after the expiration of the thirty days, the directors must be taken to have waived the giving of proof of the health of the party on whose life the assurance was made, and that the payment enured as a payment made in due time, and that the policy was thereby revived. Taking that literally, it is, that the directors waived the production of proof of the state of health of a man who was supposed to be alive, not the *fact* of his being alive. They cannot be assumed to have waived the condition that the person whose life was insured should really be a living person at the time the renewal or revival of the policy takes place. Then it was said that the payment and acceptance of the premium created a new contract. But in truth it is no new contract at all: it was intended as a payment under the original contract. The result is, that the policy was not renewed, and our judgment must be for the defendants.

Byles, J.—I also think that the defendants are entitled to judgment. An important question is glanced at here, viz. as to the effect of a payment of the premium on a life policy after the expiration of the period covered by the policy, and within the number of days usually allowed by the conditions for making the payment, or, as they have sometimes been called, the days of grace. I am not aware of any authority upon that subject, except what fell from this court in the recent case of Simpson *v.* The Accidental Death Company, 2 C. B. N. S. 257 (E. C. L. R.

vol. 89). It is unnecessary on the present occasion to pronounce any opinion upon that question. It may be observed, that, whatever might have been the construction if the policy had been utterly silent in this *645] respect, here it is in terms a contract or *undertaking against the happening of a future event. "Dead or alive,"—which would be equivalent to "lost or not lost" in a marine policy,—seems to be excluded by the terms of the policy and the third condition. But the objection that the payment did not take place within the thirty days, clearly appears to me to be fatal to the plaintiff's claim. The payment and receipt were ultrà the condition and under a mistake. The effect would be that the plaintiff might maintain an action to recover back the premium so paid, on the ground of its having been paid and received under a mistake of fact. Judgment for the defendants.

See Mutual Benefit Life Insurance Co. v. Ruse, 8 Georgia 534; Blanchard v. Atlantic Insurance Co., 33 New Hamp. 9. In Buckbee v. United States Insurance Co., 18 Barbour 541, it appeared that an insurance was effected by a person on his life for the benefit of his wife. By the terms of the policy the premium was to be paid quarterly in advance. It was also provided that in case the premium should not be paid on the day specified, the policy should be void; but in such a case it might be renewed at any time on production of satisfactory evidence as to the health of the insured, and payment in full for back premiums, a re-examination by a medical examiner of the company, at the expense of the insured, being made in all cases indispensable, when the thirty days should have expired. The premiums were not generally paid on the day on which they fell due, but were received afterwards without any objection. The last one, which was due on the 10th of December, 1851, was not paid until the 16th, and no objection was then made to receiving it. The insured died on the 12th of January, 1852, having been sick at the time of the last payment on the 16th of December. It was held that by their conduct and course of dealing the company had waived the right to prompt payment of the premiums, and therefore that the policy stood on the same footing as if the premium had been paid when actually due.

An insurance on the life of a person was effected by a company who subsequently made a re-insurance of the original risk with another company. At the time of the re-insurance the assured was dead, but both companies were ignorant of the fact. The re-insurance was held to be binding on the second company: Philadelphia Life Insurance Co. v. American Life Insurance Co., 23 Penn. St. 65.

POWIS v. BUTLER and Another, Executors of CHARLES WALTON, deceased. *Jan.* 18.

The executors of one whose name has since his decease been inserted in the last-filed memorial or return (under the 7 & 8 Vict. c. 113, s. 16), are not liable to execution on a judgment against the company, although the testator was properly returned as a shareholder in previous memorials.

THIS was a scire facias against the defendants as executors of the last will and testament of Charles Walton, deceased, who was at the

time of his death a shareholder in the Royal British Bank, upon a judgment obtained by the plaintiff in this court in an action against Robert Palmer Harding, the official manager of the said bank. The writ called upon the defendants to show if they had or knew of anything to say for themselves why the plaintiff should not have execution against them of the debt and costs therein mentioned, to be levied upon the goods and chattels which were of the said Charles Walton, deceased, in the hands of the defendants as such executors as aforesaid to be administered; and, by consent of the parties, and by *direction of the court, [*646 the following case was stated without any pleadings:—

The Royal British Bank was a joint stock banking company incorporated and carrying on business under the provisions of the statute 7 & 8 Vict. c. 113.

The said bank stopped payment on the 3d of September, 1856; and, on the 24th of the same month, an order was made by Vice Chancellor Kindersley to wind up the affairs of the said bank under the Joint Stock Companies Winding-up Act, 1848, 11 & 12 Vict. c. 45; and, on the 13th of October last, the above-named Robert Palmer Harding was duly appointed, and still was, official manager of the said bank.

The plaintiff, on the 1st of January, 1856, deposited with the Royal British Bank the sum of 250*l.*, and received a note of which the following is a copy:—

"Royal British Bank, Islington Branch.

"1st January, 1856.

"No. 9070. London. 250*l.*

"Received on deposit from Mr. Henry Powis, 2 Islington Green, the sum of two hundred and fifty pounds, to be accounted for, with interest at the rate of 5*l.* per cent. per annum, ten days after notice.

"By order of the court of directors,

"W. J. MILLARD, Manager.

"Entered, R. Grey, Acct."

At the time of the stoppage of the bank, the sum of 8*l.* 13*s.* 1*d.* had become due for interest upon the said deposit, of which 8*l.* 13*s.* 4*d.* was due for interest on the 16th of April, 1856, when the said Charles Walton died, as hereinafter mentioned.

The plaintiff had also a drawing account with the bank; and there was due to him on such drawing account at the time of the stoppage of the bank 310*l.* 16*s.* 11*d.*; which three sums in all amounted to 569*l.* 15*s.* 2*d.*

On the 9th of October last, a petition for adjudication *in [*647 bankruptcy was presented against the said Royal British Bank, under which the said bank was duly adjudged bankrupt; and, at a meeting for the proof of debts, held at the Court of Bankruptcy, the plaintiff duly proved his said debt against the said bank at the sum of 569*l.* 15*s.* 2*d.* The plaintiff also proved his debt before the chief clerk of Vice Chancellor Kindersley, under the Winding-up Act.

On the 2d of December last, the plaintiff commenced the said action against the official manager of the said bank, to recover the said sum of 569*l.* 15*s.* 2*d.*; and, on the 23d of December, judgment was obtained against the said official manager for that amount, and 6*l.* 6*s.* 4*d.* costs of suit, making together 576*l.* 1*s.* 6*d.*

A writ of fi. fa. was issued on the 23d of December, 1856, upon the

said judgment, directed to the sheriffs of London, to levy the sum of 576*l.* 1*s.* 6*d.*, besides, &c., upon the effects of the said bank, to which there was a return of nulla bona: and it is admitted that the bank had no property from which the plaintiff could obtain the satisfaction of his judgment-debt.

In June, 1856, a memorial was duly filed under the provisions of the said act of parliament (7 & 8 Vict. c. 113), setting forth the title of the said company, the names and places of abode of the members thereof, and the other particulars required by the act, which was the last memorial filed by the bank. In this memorial appeared the name of the deceased, Charles Walton, described therein as of Tulse Hill, Surrey, shipowner.

The said Charles Walton died on the 16th of April, 1856, having previously made his will, by which he appointed the defendants the executors thereof; and the defendants proved the said will in the prerogative court of the Archbishop of Canterbury on the 15th of May, 1856.

*648] The deceased at the time of his death was possessed *of twenty shares in the said bank: but the defendants have not been, or claimed to be, registered as shareholders in the said bank in respect of such shares, or any of them, nor made any declaration under the 26th and 27th sections of the said act of parliament.

By the 9th section of the deed of settlement of the said bank, dated the 2d of July, 1849, and executed by the said Charles Walton, it was declared that there should be no benefit of survivorship between the proprietors.

On the 16th of April, 1856, the day of the testator's death, there was a sum of 107*l.* 5*s.* 1*d.* standing in the books of the said company to the credit of the plaintiff upon his said drawing account; and that was the whole amount then due to him upon such account. On the 19th and 24th of the same month, the plaintiff drew out of the bank upon the said account more than 107*l.* 5*s.* 1*d.*, without paying into the bank any sum or sums specifically to meet or provide for the amount so drawn out, or any part thereof. Sums, however, were from time to time during the months of April, May, and June, 1856, paid into and drawn out of the said bank by the plaintiff upon the said drawing account: the result of which was, that, on the 30th of June, 1856, a sum of 36*l.* 15*s.* 8*d.* was due as a balance from the bank to the plaintiff upon such account. A copy of the account accompanied the case, and was to be considered as part thereof.

In or about the month of August, 1856, the defendants instructed their brokers, Messrs. Hichens & Harrison, members of the Stock Exchange, to sell the said twenty shares; and, on the 21st of the said month of August, the said Messrs. Hichens & Harrison sold ten of the said shares to certain brokers named Vigne & Sons, and the remaining ten of the said shares to a broker named Russell; and, on the 28th of *649] the same *month of August, being the name-day in the said Stock Exchange, the said Messrs. Hichens & Harrison received from the said Messrs. Vigne & Sons and Mr. Russell respectively a memorandum or ticket containing the name, address, and occupation of the person to whom the shares so purchased by the said Messrs. Vigne & Sons and Mr. Russell respectively were to be transferred; and, on the

following day, viz. the 29th of the said month of August, the said Messrs. Hichens & Harrison by their clerk forwarded to the head banking-house of the said bank the particulars required by the charter or deed of incorporation of the said bank, and at the same time requested that the deeds of transfer of the said shares to the respective purchasers might be prepared by the proper officer of the bank. The said clerk was informed by a duly qualified officer of the said bank that the said Messrs. Hichens & Harrison might prepare such transfers themselves, and the necessary forms of deeds of transfer were then given by such officer to the said clerk for that purpose. The said Messrs. Hichens & Harrison accordingly prepared two deeds of transfer of the said shares; by one of which deeds the defendants assigned and transferred ten of the said shares to Joseph Renfrey, being the person named as the purchaser thereof in the said ticket or memorandum so received from the said Messrs. Vigne & Sons as aforesaid; and by the other of such deeds the defendants assigned and transferred the remaining ten of the said shares unto James Meston, being the person named as the purchaser thereof in the said ticket or memorandum received from the said Mr. Russell as aforesaid. Such deeds were respectively duly executed by the defendants before the said bank stopped payment, and with the certificates of the said shares were delivered to the brokers of the respective purchasers; and the defendants duly received the purchase *or consideration moneys in such deeds of transfer respectively mentioned to be paid to them. [*650

The bank had not observed the terms of the charter as regards requiring the giving of notice to the bank previous to transfers being made of shares: but, when such transfers were executed, the course pursued by the said bank was, to have the deeds of transfer lodged with the bank, and then the same were entered on a register of transfers kept by the bank; and a memorial was endorsed on the transfer-deed indicating the fact of the same being registered.

In reference to the said transfers to the said Joseph Renfrey and James Meston, the bank had suspended business before the said two deeds of transfer could be registered.

On the 12th of January, 1857, an order was made by the Master of the Rolls to administer the estate of the said Charles Walton, deceased, in Chancery; and, by an order dated the 18th of February, 1857, it was ordered that the said Henry Powis (the above-named plaintiff) be restrained until the further order of the court from taking or prosecuting any proceedings at law against the above-named defendants as executors of Charles Walton, deceased, or either of them, for or in respect of any debt or sum of money claimed by the said Henry Powis to be due or owing to him from the Royal British Bank, or on any judgment obtained by him against Robert Palmer Harding as official manager of the said bank; and it was ordered that the said Henry Powis be at liberty to go in and prove under the said order dated the 12th of January, 1857, for his costs of his proceedings at law up to the time of his having received notice of the said order, and also his debt, if any, for recovery whereof the proceedings at law were taken against the said official manager.

The plaintiff, pursuant to such last-mentioned order, *claimed to prove the debt alleged to be due to him, under the said order [*651

dated the 12th of January, 1857, when the chief clerk of the Master of the Rolls adjourned such claim into court for argument. On such claim being argued, the Master of the Rolls directed the question to be submitted to a court of common law; and, to enable the plaintiffs to take the necessary steps, by an order dated the 26th of March, 1857, on the said Henry Powis undertaking not to issue execution on any judgment, rule, or order which might be obtained at law, without the leave of the Court of Chancery, his Honour ordered that the said order dated the 18th of February, 1857, so far as it restrained the said Henry Powis from taking or prosecuting any proceedings at law against the defendants as executors of Charles Walton, deceased, or either of them, for or in respect of any debt or sum of money claimed by the said Henry Powis, be discharged.

Since the stoppage of the bank, the plaintiff has received the sum of 516*l.* 11*s.* 3*d.* on account of his said judgment debt, viz. two dividends under the said bankruptcy amounting in the whole to 227*l.* 15*s.* 7*d.*, and 288*l.* 15*s.* 8*d.*, the proceeds of an execution against another shareholder in the bank upon the judgment.

The plaintiff claims the sum of 59*l.* 10*s.* 8*d.* as still due to him upon the said judgment, after giving credit for the sums so received by him.

The question for the opinion of the court is, whether the plaintiff is entitled to issue execution upon the said judgment against the defendants, to be levied upon the goods and chattels which were of the said Charles Walton, deceased, in the hands of the defendants as such executors as aforesaid to be administered.

If the court should be of opinion that the plaintiff was so entitled, then judgment was to be entered up for the plaintiff, for such sum as the
*652] court should direct, *and costs of suit, together with all costs of and occasioned by the previous proceedings of the plaintiff against the defendants as such executors as aforesaid to obtain satisfaction of the said judgment. If the court should be of a contrary opinion, then judgment of non-pros, with costs of the action, and all other costs occasioned to the defendants by the above proceedings against them, should be entered up for the defendants.

The following was the account annexed to the case:—

Henry Powis in account with the Royal British Bank.

1856.		£	s.	d.
Brought forward		973	17	6
April 5.	Sundries	122	2	1
19.	Do.	190	2	1
30.	Do.	172	8	0
May 10.	Do.	180	0	0
17.	Do.	129	1	0
24.	Do.	128	10	0
26.	Do.	31	0	0
27.	Do.	24	0	0
31.	Cash	65	0	0
June 9.	Do.	208	5	0
17.	Do.	90	0	0
21.	Do.	110	0	0
27.	Do.	75	0	0
Carried forward		2499	5	8

1856.		£	s.	d.
Brought forward		821	5	6
April 4.	Wormsley	28	19	0
14.	Palmer	13	10	0
	Green	20	9	0
	Thompson	15	19	0
	Nelson	9	1	9
15.	Barnard	4	7	0
16.	Baker	19	6	0
	Williams	44	16	6
	Berens	3	12	3
	Wreford	7	8	6
	Block	63	6	3
	Hind	20	14	10
19.	Sharp	41	16	9
	Nelson	30	9	0
26.	Pyott	10	15	0
29.	Huton	32	14	6
Carried forward		1185	10	10

Brought forward				£2499	5	8	Brought forward			£1185	10	10
							May 2.	Carlisle		12	4	0
							7.	Stevenson		32	13	6
							12.	Hind		25	13	0
								Phillips		40	10	0
								Irvin		7	7	6
								Evans		17	4	0
								Thompson		200	0	0
							May 12.	Pratt		7	13	6
								Scofield		7	0	0
							16.	Swainson		37	2	0
								Stagg		50	12	0
							19.	Thompson		100	0	0
							27.	Leverson		10	4	7
							29.	Sharp		204	7	0
							31.	Wilson		20	11	0
							June 7.	Milson		19	10	0
							11.	Solomon		15	13	0
							12.	Thompson		121	13	0
								Leaf		15	0	0
							17.	Swaine		11	16	6
								Thompson		145	3	0
							19.	Bushay		5	13	0
								Lamb		12	0	0
								Palmer		7	15	6
							25.	Green		16	9	8
								Barnard		9	1	0
								Hallen		19	0	11
							28.	Pepper		12	0	0
							30.	Pitt		7	15	6
								Sharp		29	4	0
								Pearson		52	1	0
								Commission		1	1	0
								Balance		36	15	8
				£2499	5	8				£2499	5	8
1856.							1856.					
July 1.	Balance			£36	15	8	July 5.	Milson		£11	12	6
	To Cash			182	0	0	25.	Hone's draft		27	5	6
26.	Do.			77	16	0	10.	Thompson		73	15	0
27.	Do.			116	5	6		Thompson		43	13	6
28.	Do.			30	5	6	Aug. 4.	Lane		40	0	0
Aug. 9.	Cash			150	0	0	11.	Burlage		5	5	6
15.	Sundries			130	12	3		Brown		4	8	0
30.	Cash			168	2	11		Thompson		42	18	6
							12.	Levean		33	3	10
							13.	Slatten		20	9	5
							13.	Hurd		7	6	0
								Edgcomb		3	4	0
								Barnard		14	2	9
								Wolf		3	18	0
							14.	Sharp		28	15	10
								Kirby		4	2	3
								Block		40	0	0
							15.	Hutton		71	5	0
								Green		11	4	6
							16.	Milson		10	5	0
							22.	Stevenson		12	10	10
							30.	Milson		32	15	0
							Sept. 1.	Sack		39	0	0
								Balance		310	16	11
				£891	17	10				£891	17	10
Balance				£310	16	11						

Beasley, for the plaintiff.—The main question is, whether the defendants are not chargeable as "existing shareholders" under the 7 & 8 Vict. c. 113, s. 21, their testator's name appearing on the memorial of shareholders last filed under the act. That section enacts that "the persons whose names shall appear from time to time in the then last-delivered memorial, *and their legal representatives*, shall be liable to all legal proceedings under this act as existing shareholders of the company." [COCKBURN, C. J.—You contend that the man's name being in the memorial is equivalent to the names of his representatives being there; and that the memorial is *conclusive* evidence?] Precisely so. [WILLIAMS, J.—Is not the authority to place his name there revoked by his death?] In ordinary cases it would be so; but not under this statute. The 6th section incorporates all those who become shareholders *and their legal representatives;* and s. 7 enacts, that, notwithstanding such incor-
*655] poration, they and their several executors, *&c., shall continue liable as if not incorporated. [COCKBURN, C. J.—If death cancelled Walton's liability, his executors could incur none. You are, in truth, seeking to fix the executors with an original liability.] The 21st section gives creditors a right to have execution against executors of a deceased person as existing shareholders. The shares are personal assets, which vest in the executors. The 16th section requires the memorial to be filed, and empowers any person to inspect it on payment of a small fee. The 17th section provides for occasional changes therein; and the 18th gives the form of the memorial. The 19th section,—which is to be construed with the 21st,—makes the memorial conclusive: it enacts, "that a true copy of any such memorial, certified under the hand of one of the commissioners of stamps and taxes for the time being, upon proof made that such certificate has been signed with the handwriting of the person certifying the same,—whom it shall not be necessary to prove to be a commissioner of stamps and taxes,—shall be *received in evidence as proof of the contents of such memorial*, and proof shall not be required that the person by whom the memorial shall purport to be verified, was, at the time of such verification, the manager or one of the directors of the company." [WILLES, J.—Ness *v.* Angas, 3 Exch. 805,† and Ness *v.* Armstrong, 4 Exch. 21,† decided that personal representatives were not liable under the 7 G. 4, c. 46.] The language of the 6th section of that statute was different from that of the 19th section of the act now under consideration. [WILLES, J.—The words are the same in both statutes,—"shall be received in evidence as proof," &c.] The only means a creditor has of knowing who are shareholders, is, the memorial; and that does not disclose the death of the party. The 26th section provides for a mode in which an executor may become an actual share-
*656] holder,—in *which case he would incur a liability different from that contemplated by s. 21. [WILLES, J.—The 26th section only affects the *rights* of the executor. May you not rely on the 7th section(*a*) as making the executors liable?] That section, coupled with the 21st, clearly does make them so. [WILLES, J., referred to 2 Wil-

(*a*) It provides, "that, notwithstanding such incorporation, the several shareholders for the time being in the said banking business, and those who shall have been shareholders therein, *and their several executors, administrators, and assigns*, shall be and continue liable for all the dealings, covenants, and undertakings of the said company, subject to the provisions hereinafter contained, as fully as if the said company were not incorporated."

liams on Executors, 5th edit., 1583.] The next question is, whether the defendants are discharged by a bonâ fide transfer of the shares before the bankruptcy of the concern (the transferees' names not appearing on the register of shareholders). This point is disposed of by the case of Dossett *v.* Harding, 1 C. B. N. S. 524 (E. C. L. R. vol. 87), where it was held, on the authority of Henderson *v.* The Official Manager of the Royal British Bank, 7 Ellis & B. 356, that a shareholder whose name is properly inserted in the last return or memorial filed at the stamp-office, cannot get rid of his liability under s. 21, by a subsequent bonâ fide transfer of his shares. [WILLIAMS, J.—We are bound by that case. We there held that the memorial was conclusive, *the shareholder being alive.*] Then, as to the last point, it is submitted that the plaintiff is entitled to appropriate the payments to the drawing account, and to recover the balance on the deposit account.

Phipson, contrà.—The plaintiff would have had no claim against Walton himself if he had been alive. It appears from the case, that, on the 1st of January, *1856, the plaintiff opened a deposit account with [*657 the bank, upon which there was due to him at the time of their stoppage in September, 1856, 258*l.* 13*s.* 1*d.*, and at the time of Walton's death 253*l.* 13*s.* 4*d.* He had also a drawing account, upon which there was due to him at the time of commencing the action 310*l.* 16*s.* 11*d.*: but the whole of that accrued since the death of Walton except about 23*l.* The judgment in the action was obtained on the 23d of December, 1856, for 569*l.* 15*s.* 2*d.* and costs. The plaintiff has since received, by payment of dividends under the bankruptcy, and from the proceeds of an execution against another shareholder, 516*l.* 11*s.* 3*d.* Independently, therefore, of the broad question as to the liability of the executors to be proceeded against either as absolute or quasi shareholders, the plaintiff has no right to proceed against the estate of Walton at all. The claim as against Walton is altogether wiped off by the appropriation of the payments to the earlier items. [WILLIAMS, J.—The payments are in reduction of the judgment debt. The real question is, whether executors are liable under s. 21.] It is submitted, that, under that section, executors cannot be proceeded against at all,—independently of the question arising on the state of the account. The 16th section of the statute requires the company to file a memorial containing the names and places of abode of all its existing shareholders; and the 17th requires them to make an additional return of all who have ceased to be members, or who have become members or shareholders of the company since the last return. In June, 1856, notwithstanding Mr. Walton was then dead, he is returned as an existing shareholder; and it is now contended that his executors are bound by this wrongful act of the directors. [CROWDER, J.—Is the creditor, who is innocent, to be damnified by that? He looks to the return.] The liability imposed by the 9th, 10th, and *13th [*658 sections is imposed only upon *existing* shareholders: and these are the only clauses giving jurisdiction. What authority is there for issuing execution against one who is not a shareholder? [CROWDER, J.—Then you dissent from the decision in Dossett *v.* Harding, 1 C. B. N. S. 524?] It is impossible to apply the machinery of the statute to a non-existing person. He cannot be served with notice, or be summoned: and you cannot reach executors, until they have done some act to make them shareholders. [COCKBURN, C. J.—Are you right in say-

ing that there is no liability in the shareholders but that pointed out by the clauses you refer to? The 6th section makes them a corporation; but the 7th section expressly declares, that, notwithstanding such incorporation, the shareholders, and their several executors, administrators, successors, and assigns, shall continue liable for all the dealings, covenants, and undertakings of the company, subject to the provisions thereinafter contained, as fully as if the company were not incorporated. The only limit is, that resort must first be had to the assets of the company. Subject to the provisions contained in the execution clauses, the shareholders remain liable: and I must confess I do not see why their representatives should not also be liable. In Fell *v.* Burchett, 7 Ellis & B. 537, where it was held that a creditor cannot maintain an action against a shareholder, his only remedy being by action against the corporation, and execution in the statutable mode,—the Court of Queen's Bench construed the words "subject to" as meaning "according to." Lord Campbell, in giving judgment, after observing upon the difficulty of reconciling the various provisions of the act, says: "My solution is, that the intention was, to guard against an inference which, it was apprehended, might be drawn from the incorporation under the letters patent in s. 6, that *659] the shareholders should *not in any way be liable to make satisfaction to the creditors; with this view it was in s. 7, by way of proviso, enacted that the shareholders, past and present, should be and continue liable, 'subject to the provisions hereinafter contained.' Giving effect to those words as meaning that they should be liable after the corporation had been sued, after its assets had been exhausted, and the other provisions complied with, s. 7 is made to harmonize with the subsequent sections. 'Subject to the provisions,' is not proper language to express this meaning: but, looking to the whole scope of the act, we are justified in considering 'subject' as a word improperly introduced, but meaning 'according.' By this construction, the individual liability is preserved, but the oppressive multiplication of suits is avoided." If read literally, the shareholders would be liable on specialty debts for twenty years, and on simple contracts for six years, instead of three years, as provided by s. 10. In conformity with the principle laid down in Fell *v.* Burchett, the Court of Exchequer, in Harris *v.* The Official Manager of the Royal British Bank, 2 Hurlst. & N. 535,† intimated an opinion that a judgment against a banking copartnership,—the bank now in question,—cannot be registered so as to affect the estate of a shareholder against whom no judgment has been obtained. If, then, an action will not lie against a shareholder on s. 7, what is the meaning of the enactment? The shareholders are to be liable only in the manner thereinafter provided; and that is confined to proceedings against persons who are shareholders. [WILLIAMS, J.—You say the words "executors and administrators" in s. 7 are inoperative?] Unless they become shareholders. Under this statute, executors are liable for contribution where execution has been executed against other shareholders: the legislature has, in s. 14, given a distinct remedy against them as such. [CROWDER, J.— *660] *Does it follow that executors cannot be proceeded against by scire facias in cases where they could not be proceeded against by motion?] The legislature could hardly have intended to make shareholders liable in any other way than that which they have so clearly and distinctly pointed out. [WILLES, J.—Would scire facias lie against the

heir of a shareholder who dies seised in fee-simple?] It is apprehended not. [WILLES, J.—It certainly would be singular to hold that the land which the heir takes by descent shall be liable by reason of the company having represented one to be a shareholder who was not so in point of fact.] In Fell *v.* Burchett, all the judges agree that the 7th section is declaratory of the mode in which recourse is to be had against those who are shareholders. The concluding words of s. 10 are remarkable,—"nor shall this act be deemed to enable any party to a suit to recover from any individual shareholder of the company, or any other person whomsoever, any other or greater sum than might have been recovered if this act had not been passed." If this act had not been passed, executors clearly would not have been liable at all. [WILLIAMS, J.—If the executors became new shareholders, they would not be liable at the time this debt was contracted.] The true meaning of s. 21 is, that the persons whose names appear in the last-delivered memorial, are to be liable to all legal proceedings under the act as existing shareholders of the company, and their executors to all such proceedings as executors are liable to.

Beasley, in reply.—The effect of Fell *v.* Burchett, 7 Ellis & B. 537, is, that shareholders are to be liable only in the way pointed out in s. 13, and are not to be harassed by a multiplicity of actions, when full remedy is given to the creditor under the judgment against the company. There can be no hardship in holding the *executor to be liable de bonis testatoris. Some light is thrown upon the construction of this act by the judgment of Parke, B., in Bradley *v.* Eyre, 11 M. & W. 432.† [*661

[It was conceded, that, though Mr. Walton was dead at the time of the filing of the last memorial, his name had been properly inserted as a shareholder in several previous memorials.]

COCKBURN, C. J.—I am of opinion that our judgment in this case must be for the defendants. This is a proceeding by scire facias under the 7 & 8 Vict. c. 113, to enforce against the executors of one Charles Walton, a deceased shareholder, a judgment obtained against the Royal British Bank, no sufficient satisfaction having been received from the property of the company. The facts, as stated in the special case, and admitted on the argument at the bar, are in substance these,—that Walton was a shareholder of the company at the time of the making of some former returns or memorials under the statute, but that, in the interval between the making of those returns and the last memorial filed by the company, in June, 1856, he died, and, notwithstanding that event, his name was inserted in the last-mentioned memorial; that the plaintiff had a claim against the company in respect of a balance due to him on a deposit account, and also on an ordinary drawing account; and that he commenced his action thereon against the company after the death of Walton. It has been contended, on the part of the plaintiff, that, inasmuch as the name of Mr. Walton appeared as a shareholder upon the memorial filed in June, 1856, by the operation of the 21st section of the statute, his estate in the hands of his legal representatives is liable to satisfy this debt. The words of that section are, "that the persons whose names shall appear from time to time in the then last-delivered memorial, *and their legal representatives*, shall *be liable to all legal proceedings under this act as existing shareholders of the company." I am far from saying that I concur in Mr. *Phipson's* view, [*662

viz. that the effect of the 6th, 7th, 10th, and 13th sections of the statute is, that a person whose name appears upon the memorial, and his estate and effects, are liable only during the lifetime of such shareholder, and that no proceedings can be taken against his legal representatives after his death to fix his estate even in respect of a claim for which he would have been himself liable if alive. It is not necessary to give any opinion upon that point. If it were, I should think it a matter which required much more consideration than I have yet been able to bestow upon it: but the present impression of my mind is the very reverse. The meaning of the 21st section appears to me to be this,—that, where a person who is a shareholder, or whose name appears as a shareholder in the last-delivered memorial, and who would have been personally liable to proceedings under the act as an existing shareholder if living, dies, his legal representatives are liable also; but, that, where the party himself would not have been personally liable, if alive, though his name appeared upon the register, his personal representatives are not liable in respect of his estate. The words of the section are, "the persons whose names shall appear from time to time in the then last-delivered memorial, *and* their legal representatives, shall be liable," &c. I do not think that can be read in the disjunctive. In the present instance, Mr. Walton, the shareholder, died before the plaintiff obtained his judgment against the company. Death had then removed him from the reach of all legal proceedings under the act. I think the utmost the legislature meant by this 21st section, is, that the legal representatives are liable where the testator or intestate himself, if living, would have been liable: *and upon this simple ground I am of opinion that the defendants are entitled to judgment.

*663]

WILLIAMS, J.—I am of the same opinion. The case has been put by Mr. *Beasley* as turning entirely upon the construction of the 21st section of the 7 & 8 Vict. c. 113: and I agree with my Lord in thinking that we cannot read the word "and" in the disjunctive. The question is, whether we are driven to say, contrary to the truth, that Mr. Walton was a shareholder at the time of the filing of the memorial in June, 1856. I do not think we are. Looking at the terms of the 21st section, it seems to me that the words "persons whose names shall appear in the memorial" are not applicable to a case like this, where the person whose name appears in the memorial was not living at the time the proceedings were taken. I think the meaning of the clause is, that, if the person whose name is on the memorial is living at the time the proceedings are taken, he is liable as an existing shareholder, and, if he dies, his liability attaches to his legal representatives. It is very like the case of abatement of legacies: if a legatee dies in the lifetime of the testator, the legacy lapses; but, if he survives the testator and then dies, it goes to his personal representatives as part of his personal estate: and a legacy lapses equally if given to a man and his legal representatives.(a) It is unnecessary to advert to the argument urged by Mr. *Phipson*, that the liability of the person whose name appears in the memorial exists only during his lifetime, and that no proceedings can be taken against his representatives after his death, so as to charge his estate, even in respect of a claim for which he would himself have been liable, had he been

(a) See Williams on Executors, 4th edit. 1036, 1038.

living. I should require much *more time for consideration before I could come to that conclusion. [*664

CROWDER, J.—I also desire to give my judgment upon the construction of the 21st section only, without offering any opinion upon the other sections of the act. It is to be assumed that Mr. Walton's name had properly been inserted in former memorials, but that he was dead at the time of the filing of the last-delivered memorial, and that the proceedings to enforce the judgment against his estate were not commenced until after his decease. The words of the 21 t section are, "that the persons whose names shall appear from time to time in the then last-delivered memorial, *and their legal representatives*, shall be liable to all legal proceedings under this act as existing shareholders of the company." It cannot be predicated of a person non-existent, that he became liable to proceedings under the act as "an existing shareholder." The fair meaning of the whole clause must be, that the liability attaches to persons on the memorial who are capable of being proceeded against, and whose liability, in case of their death, passes to their representatives, so that there may be no failure of proceedings where the liability has once attached. I am by no means satisfied that the language of that section can be reconciled with that of some of the other provisions of the act, or that a consistent construction can be put upon the whole. But I am clearly of opinion that Mr. Walton did not come within the category of persons liable to be proceeded against under s. 21, inasmuch as he was not in existence at the time the memorial was filed or the proceedings commenced; and therefore I think the defendants are entitled to judgment.

WILLES, J.—I am of the same opinion. The 21st section of the statute in question certainly raises *considerable difficulty. Construed literally, it amounts to this, that the persons who file the [*665 memorial under s. 17, have the power of putting therein the name of any person they please, without such person having any remedy or any means of withdrawing his name therefrom. When that comes to be considered, the absurdity of it will be found so great that the courts will feel it necessary to put such a construction upon the section as will prevent such a consequence. Possibly there may be a remedy by indictment against persons who so conduct themselves. It is unnecessary, however, to consider that now. I found my judgment in this case upon the grounds already stated by the rest of the court. The 21st section, when speaking of the liability of persons as existing shareholders, must mean persons who would be liable to have legal proceedings taken against themselves. Here, the testator, Walton, was dead at the time of the filing of the memorial in June, 1856. No proceeding, therefore, could be taken under the act against him; nor do I think any proceedings could be founded against his legal representatives on s. 21.

Judgment for the defendants.

FRY *v.* RUSSELL. *Jan.* 18.

A shareholder whose name is properly inserted in the last-delivered memorial, remains liable to execution under the 13th section of the 7 & 8 Vict. c. 113, although he has subsequently bonâ fide transferred his shares, and the transfer-deed has been duly executed by the transferee, and registered under s. 28.

THIS was a scire facias against the defendant as an alleged shareholder in the Royal British Bank, on a judgment obtained by the plaintiff in an action in this court in which the now plaintiff was the plaintiff, and Robert Palmer Harding, the official manager of the said Royal British
*666] Bank, was the defendant, for the sum *of 75*l.* 16*s.* 7*d.* and 5*l.* 7*s.* 4*d.* (for costs), to enable the plaintiff to have execution upon the said judgment to satisfy the plaintiff the sum of 68*l.* 2*s.* 2*d.* which is now due on the said judgment and still unpaid; and by consent of the parties, and by the direction of the court, the following case is stated, without pleadings:—

The Royal British Bank was a joint stock company incorporated by Royal Charter dated the 20th of June, 1849, for the purpose of carrying on the business of a joint stock bank in England under the statute 7 & 8 Vict. c. 113, "An act to regulate joint stock banks in England."

The said bank stopped payment on the 3d of September last; and on the 24th an order was made by Vice Chancellor Kindersley to wind up the affairs of the said bank under the Joint Stock Companies Winding-up Acts, 7 & 8 Vict. c. 111, and 11 & 12 Vict. c. 45: and, on the 13th of October last, the said Robert Palmer Harding was duly appointed the official manager of the said bank, and has continued to be such official manager up to the present time.

On the 9th of October last, a petition for adjudication in bankruptcy was presented against the said Royal British Bank, under which the said bank was duly adjudged bankrupt; and, at a subsequent meeting for proof of debts, held at the Court of Bankruptcy before the commencement of the said action against the said official manager of the said bank, in the matter of the petition against the said bank, the plaintiff proved his said debt according to the form prescribed by the bankrupt law.

On the 6th of February last, the plaintiff, having first proved his debt under the winding-up proceedings, commenced the said action against the said Robert Palmer Harding, the official manager of the said bank,
*667] to recover the said sum of 75*l.* 17*s.* 5*d.*, which was then *due to him from the bank; and, on the 24th of February last, judgment was obtained against the said official manager of the said bank, for the sum of 75*l.* 17*s.* 5*d.*, and 5*l.* 7*s.* 4*d.* costs of suit, making together the sum of 81*l.* 4*s.* 11*d.*

A writ of fieri facias was issued on the said 24th of February last upon the said judgment, directed to the sheriffs of London, to levy the said sum of 81*l.* 4*s.* 11*d.* upon the effects of the said bank, at the head offices of the said bank in Threadneedle Street; and, on the following day, the said sheriffs made a return to the said writ, as follows:—"The within named The Royal British Bank hath not any goods or chattels in our bailiwick. JOHN JOSEPH MECHI and FREDERICK KEATS, sheriffs."

The said British Bank had not any goods or chattels elsewhere from which the plaintiff could obtain satisfaction of his said judgment-debt;

and any other execution against the property and effects of the said bank would have been ineffectual for that object.

A memorial was made out and filed at the Stamp-Office by the manager of the said bank,—a copy of which memorial accompanied and was to be part of the case,—and this was the last-delivered memorial of the said bank. The admissibility and effect of this memorial was disputed by the defendant.

In this memorial, the name of the defendant, described as of Albert Villas, Seven Sisters Road, Upper Holloway, gentleman, appeared, and still appears, as a shareholder of the said bank.

On the 2d of March, 1857, the plaintiff caused the defendant to be duly served with a proper ten days' notice of his intention to issue execution on the said judgment against the property and effects of the defendant as a shareholder in the said bank; and such notice had expired before any proceedings were taken by the plaintiff against the defendant.

*The defendant, in the month of March, 1856, became the holder, by purchase, of four shares in the said bank; and, on the [*668 28th of July in the same year, he sold the same four shares, through Messrs. Thomas Fenn & Co., share-brokers, of the London Stock-Exchange, in the open market, for 164*l.*, and, with the consent of the directors of the said bank, regularly transferred the same to John Kilpatrick, by a deed of transfer executed by him and the said John Kilpatrick, dated the 2d of August, 1856, duly made in compliance with the charter of the said bank; and the deed of transfer was on the said 2d of August duly entered in the register of shareholders of the said bank; and the name of the said John Kilpatrick was then entered as the proprietor of, and he became a shareholder in, the said bank, and has so continued ever since, in respect of the said shares: and the defendant contends that he then wholly ceased to be a shareholder in the said bank, or to have any interest therein, and that his liability as such then determined, except as specially provided in the said act of parliament.

The defendant never held or was possessed of or entitled to any share or shares in the said bank, except the aforesaid four shares, and except two other shares which were transferred into his name by William Nairn in the year 1850, as a security for a debt; and these last-mentioned two shares were sold by him, and duly transferred to the purchaser thereof, in June, 1851; and no liability is sought to be fixed upon the defendant in respect of his having held those shares.

The question for the opinion of the court, was, whether the defendant was liable, as an existing shareholder of the said Royal British Bank, to the plaintiff in this action.

If the court should be of opinion in the affirmative, then judgment was to be entered up for the plaintiff *for 68*l.* 2*s.* 2*d.* and costs [*669 of suit. If the court should be of opinion in the negative, then judgment of non pros., with costs of the action, was to be entered up for the defendant.

Beasley, for the plaintiff.(*a*)—This question, like that in Powis *v.* Butler,

(*a*) The points marked for argument on the part of the plaintiff, were,—

"That the defendant is liable to execution against him at the suit of the plaintiff: That, although the defendant may not have been a shareholder de facto at time of the judgment recovered in the original action, he is nevertheless liable to have execution issued against him as an existing shareholder, his name appearing in the last-delivered memorial at the Stamp-

antè, p. 645, turns upon the construction of the 7 & 8 Vict. c. 113, s. 21, which enacts that "the persons whose names shall appear from time to time in the then last-delivered memorial, and their legal representatives, shall be liable to all legal proceedings under this act as existing shareholders of the company." In this case, Mr. Russell had bonâ fide transferred his shares, and the transfer-deed had been duly executed by the transferree, and registered pursuant to the 23d section; but his name appeared on the last-delivered memorial, and consequently he is liable as "an existing shareholder." The case is disposed of by the decision of this court in Dossett *v.* Harding, 1 C. B. N. S. 524, where it was held that a shareholder whose name is properly inserted in the last return or memorial filed at the Stamp-Office, cannot get rid of his liability under s. 21, by a subsequent bonâ fide transfer of his shares. The memorial is all that a creditor can have recourse to for information; *670] and a *certified copy is by s. 19, to be "received in evidence as proof of the contents of such memorial."

Milward, contrà.(*a*)—The real question turns upon the construction of the statute generally, and not merely upon the meaning of the 21st section. None of the cases have any application, with the exception of Dossett *v.* Harding; and that is distinguishable; for, the affidavit of the party sought to be charged did not show that the transfer was in the proper form, or that it was executed by the transferree, or registered by the company. Upon this subject the observations of Kindersley, V. C., in the case of In re The Royal British Bank, Ex parte Walton, 3 Jurist, N. S. 853, are well worthy of attention. [CROWDER, J.—Your argument, then, is, that the 21st section means that the memorial shall be primâ facie evidence only, not conclusive.] Yes. It was so held by Coleridge, J., at Chambers, in a case where the name of a party had been erroneously inserted in the new memorial. The 6th section provides that the company may be incorporated. The 7th section enacts, "that, notwithstanding such incorporation, the several shareholders for the time being in the said banking business, and those who shall have been shareholders therein, and their several executors, administrators, successors, and assigns, shall be and continue liable for all the dealings, covenants, and undertakings of the *671] *said company, subject to the provisions hereinafter contained, as fully as if the said company were not incorporated." The 9th section enacts "that every judgment, decree, or order of any court of justice in any proceeding against the company may be lawfully executed against, and shall have the like effect on, the property and effects of the company, and also, subject to the provisions hereinafter contained, upon the person, property, and effects of every shareholder and former shareholder thereof, as if every individual shareholder and former share-

Office: And that, notwithstanding that the defendant may have transferred his shares, his liability to have executions issued against him continues so long as his name appears in the said memorial."

(*a*) The points marked for argument on the part of the defendant, were,—

"That he was not liable to the execution sought to be had against him; that, as he was not a shareholder in fact at the time of the judgment recovered in the original action, he cannot be fixed as such; that the completed transfer of his shares, and the introduction of a new shareholder in respect of such shares, relieved him from all liability; and that the statute 7 & 8 Vict. c. 113 cannot be construed so as to fix a person *not* a shareholder in fact with liability as if he *were* a shareholder."

holder had been by name a party to such proceeding." [COCKBURN, C. J.—It will not be disputed on the other side, that, but for the 21st section, to make a party liable for the contracts of the company, it must be shown that he is an actual shareholder.] The proviso in the 10th section is material,—"that no person having ceased to be a shareholder of the company, shall be liable for the payment of any debt for which any such judgment, decree, or order shall have been so obtained, for which he would not have been liable as a partner in case a suit had been originally brought against him for the same, or for which judgment shall have been obtained after the expiration of three years from the time when he shall have ceased to be a shareholder of such company; nor shall this act be deemed to enable any party to a suit to recover from any individual shareholder of the company, or any other person whomsoever, any other or greater sum than might have been recovered if this act had not been passed." That shows what ought to be the construction of the 21st section. It is the duty of the directors to keep the register in order, and to see that a due account is filed of existing shareholders. [COCKBURN, C. J.—The shareholder has the means of compelling the directors to do their duty in that respect: the creditor has not. CROWDER, J.—The language of s. 21 would seem to show *that the memorial [*672 was to be conclusive.] According to that construction, the memorial is not used as proof of an existing fact, but to create a liability which had no previous existence. The 16th, 17th, and 18th sections show that it is exclusively the duty of the manager and directors to make and to keep perfect the memorial; and that the shareholders have no control whatever over it. The 21st section may be made reconcileable with all the other provisions of the act by substituting "being" for "as." By the 23d section, the interest of the transferror ceases on the transfer being registered, and the transferree, and the transferree only, from that moment becomes liable for calls. [WILLIAMS, J.—What do you conceive to have been the object of the 21st section?] To make the memorial evidence. [WILLIAMS, J.—That had already been done by the 19th section.] The 19th section merely makes a certified copy admissible. [WILLES, J.—Under the 6th section of the 7 G. 4, c. 46, the memorial was always received as evidence.(a) WILLIAMS, J.—It would be a cruel trap for a creditor, who has no means of information but what the memorial affords him, to hold it to be no *more than [*673 primâ facie evidence.] It would be equally hard upon the shareholder to hold him conclusively bound by a document over whose preparation he has no control. [COCKBURN, C. J.—He is a volunteer. He may go to the directors, and get his name taken off the memorial by the means pointed out in s. 17.] Cur. ad. vult.

WILLES, J., now delivered the judgment of the court.—In this case

(a) That section enacted "that a copy of any such account or return so filed or kept and registered at the Stamp-Office as by this act is directed, and which copy shall be certified to be a true copy under the hand or hands of one or more of the commissioners of stamps for the time being, upon proof made that such certificate has been signed with the handwriting of the person or persons making the same, and when it shall not be necessary to prove to be a commissioner or commissioners, shall in all proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as proof of the appointment and authority of the public officers named in such account or return, and also of the fact that all persons named therein as members of such corporation or copartnership were members thereof at the date of such account or return."

the defendant was a shareholder in the company at the time the last memorial was filed, viz. in June, 1856; and, although he had transferred his shares, and the transfer-deed had been duly executed by the transferree, and registered by the proper officer of the company, no further memorial had been filed showing that he had ceased to be a shareholder. The case, therefore, falls precisely within that of Dossett v. Harding, 1 C. B. N. S. 524 (E. C. L. R. vol. 87), and not within the rule laid down in Powis v. Butler, antè, p. 645.(a) Our judgment must, therefore, be for the plaintiff. Judgment for the plaintiff.

(a) This case was argued before that of Powis v. Butler, antè, p. 645, but the judgment was postponed.

*674] *SINNOTT v. THE BOARD OF WORKS FOR WHITECHAPEL DISTRICT. *Jan.* 28.

An action upon a contract for cleansing the streets of a parish, entered into by the trustees under a local act, is, by virtue of the 90th, 93d, 94th, and 95th sections of the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, properly brought against the district board created under the last-mentioned act.

THE declaration stated, that, before the passing or coming into operation of the 18 & 19 Vict. c. 120, intituled "An Act for the better local management of the Metropolis," to wit, on the 4th of August, 1855, by articles of agreement made between the trustees of the parish of St. Mary, Whitechapel, of the one part, being the trustees incorporated by "The Whitechapel Improvement Act, 1853" (16 & 17 Vict. c. cxli.), and the plaintiff of the other part, and sealed with the common seal of the said trustees, and with the seal of the plaintiff,—after reciting that the said trustees had lately advertised for tenders for sweeping and cleansing the streets and other places, and the gutters and channels thereof, as well the footways as carriageways, within such parts of the said parish as were not within the liberties of Her Majesty's tower of London and city of London, for eleven months, commencing on the 1st of August then instant; and that the plaintiff had agreed to perform such work in manner thereinafter mentioned for the sum of 1270*l.*, payable as thereinafter mentioned,—it was witnessed, that, in consideration of the covenant thereinafter contained for the payment of the said sum of 1270*l.* to the plaintiff in manner thereinafter mentioned, he the plaintiff did covenant with the said trustees in manner following, that is to say, that he the plaintiff should and would for the full end and term of eleven months to be computed from the 1st of August then instant, in an efficient, workmanlike, and proper manner, and to the satisfaction of the said trustees for the time being, and of the person, if any, from time to time acting as their superintendent or inspector or *675] *other officer in that behalf, three times in every week during the said term of eleven months, and on such days and times of the day as might be from time to time appointed for that purpose by the said trustees for the time being, or by such person so acting, thoroughly cleanse, sweep, load, collect, cart, and carry away, and deposit in or upon some proper place to be from time to time provided for that purpose by the plaintiff out of the said parish, all the dirt, slop,

filth, and offensive matter from and out of all and every the streets, squares, ways, lanes, passages, courts, yards, roads, alleys, and places open to the public within such parts of the said parish of St. Mary, Whitechapel, as did not lie within the liberties of Her Majesty's tower of London or city of London, and of and from and out of all the gutters and channels in, along, or across any of the carriageways or foot-pavements or footways of the said streets, squares, ways, lanes, yards, roads, alleys, and places as aforesaid; and that, in case the plaintiff should neglect or omit to cleanse, sweep, load, collect, cart, drive, and carry away all the dirt, slop, filth, and offensive matter from and out of any of the said streets, squares, ways, lanes, passages, courts and yards, roads, alleys, and places open to the public, of or from or out of all and every the gutters and channels in, along, or across the carriageways or foot-pavements or footways of all the said streets, &c., and places, at and upon the respective days and times appointed for that purpose, and in the manner and to the satisfaction aforesaid, he the plaintiff should pay to the trustees aforesaid for the time being, for every such neglect or omission as aforesaid (over and above all penalties to which in such case the plaintiff might by act of parliament be subject), for and in respect of each and every of the streets and places mentioned and described in the first schedule thereunder written, except such parts as lie within the *liberties of Her Majesty's tower of London, the sum of 1*l.* for every such neglect or omission, and for and in respect of each [*676 and every of the streets and places included and comprised in the second schedule thereunder written, except as aforesaid, the sum of 10*s.* for every neglect or omission, such sums respectively to be considered and recoverable as liquidated damages: Provided always, that, in case the plaintiff should at any time during the continuance of that contract, neglect or omit to cleanse, sweep, load, collect, cart, and remove all the dirt, slop, filth, and offensive matter from or out of all or any part of all or any of the said streets, squares, &c., or from or out of all and every the gutters and channels along or across the foot-pavements or footways of any of the said streets, squares, &c., at or upon the respective days and times appointed for that purpose, or wherein he or they ought to perform the said matters, and in the manner, and to the satisfaction aforesaid,—then and in every such case it should and might be lawful for the said trustees for the time being as aforesaid, or the person acting as their superintendent or inspector or officer as aforesaid, without notice to the plaintiff, to hire and employ any other person or persons, with carts, horses, men, materials, tools, and implements, to execute, do, and perform the same works so neglected or omitted, and so from time to time as often as any such neglect or omission should happen: And the plaintiff did by the said articles covenant with the said trustees that it should be lawful for the trustees for the time being, and without having made any previous demand, to retain and deduct out of any sum of money that might become due and payable to the plaintiff for or on account or by virtue of that agreement, or otherwise, all and every the costs, charges, and expenses that might be in any way incurred by the trustees for the time being for or by reason of their *hiring or [*677 employing any other person or persons with carts, horses, men, materials, tools, or implements for any of the purposes hereinbefore mentioned, and for or by reason of any neglect or omission on the part

of the plaintiff; and that it should and might be lawful for the said trustees for the time being as aforesaid to retain and deduct out of and from any sum of money that might become due and payable to the plaintiff, all such sums, as liquidated damages, as might under the provisions of the said agreement be payable to the trustees for the time being by the plaintiff for any such neglect or omission as aforesaid, or any costs, charges, and expenses incurred by the trustees in consequence thereof, or in remedying the same: And by the said articles of agreement, in consideration of the plaintiff from time to time well and truly observing, performing, and keeping all the clauses, articles, and matters in the said articles of agreement contained, they the said trustees did,—but covenanting only so far as they lawfully might, and so far only as they might without charging or binding themselves or any of them individually, or their heirs, executors, or administrators, or the estate or effects of them or any of them,—covenant with the plaintiff that he should be at liberty for the period of eleven months from the said 1st of August, to take, use, and enjoy for his own proper use and benefit all the dirt, slop, and filth to be by him collected, carted, and carried away, in pursuance of the said articles, from the streets and other places aforesaid; and that the trustees for the time being should and would well and truly pay or cause to be paid unto the plaintiff the sum of 1270*l.* by four equal payments of 317*l.* 10*s.* each, after retaining and deducting thereout all the costs, charges, and expenses, and liquidated damages, if any, as thereinbefore mentioned and agreed or empowered to be retained and deducted,

*678] —the first of such *quarterly payments to be made on the 1st of November then next ensuing, another of such quarterly payments to be made on the 1st of February, 1856, another of such quarterly payments on the 1st of May then next following, and the remaining quarterly payment on the 31st of July then next following, which had passed before suit: Averment, that the said parish was and is a parish included in a district mentioned in Schedule B. to the said first-mentioned act of parliament, and that all the duties, powers, and authorities in relation to the paving, lighting, watering, cleansing, or improving of such parish at any time vested in the said trustees, and all other duties, powers, and authorities in any wise relating to the regulation, government, or concerns of the said parish, and the inhabitants thereof (except and save as in the said act is excepted and provided), had before suit become vested in and were performed and exercised by the defendants pursuant to the said act of parliament; and that, although the plaintiff had done all things, and all things had happened, necessary to entitle the plaintiff to payment of the whole of the said moneys so payable to him as aforesaid, and to maintain the action; yet that no part of the said sum of 1270*l.* had been paid to the plaintiff, contrary to the said covenant in that behalf aforesaid, and there was then due to him under and by virtue of such covenant a large sum, to wit, the sum of 1269*l.*

There was a second count, for money payable by the defendants to the plaintiff for work done by the plaintiff for the said trustees, at their request, and before the coming into operation of the first-mentioned act, and for money before then paid by the plaintiff for the said trustees, at their request, and for money found to be due from the said trustees to the plaintiff on accounts stated between them.

*There was also a third account, for work done by the plaintiff for the defendants at their request, and for moneys paid by the plaintiff for the defendants at their request, and for money found to be due from the defendants to the plaintiff upon accounts stated between them, &c. [*679

The defendants demurred "to the first count, and to the counts for work done and money paid for, and money found to be due from, the said trustees," the ground of demurrer stated in the margin being,— "that the part of the declaration demurred to is founded upon contracts with the trustees of the parish of St. Mary, Whitechapel, and that the liability on such contracts is not transferred to the defendants, but that s. 94 of the 18 & 19 Vict. c. 120 provides that such contracts shall be proceeded on and enforced as if the act had not passed," and that the action should have been against *the trustees*.

Watkin Williams, in support of the demurrer.(*a*)—The question is, whether this action is properly brought against the new board, or whether it ought not to have been brought against the trustees under the local act. The 90th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120, enacts, amongst other things, that "all the duties, powers, and authorities for or in relation to the paving, lighting, watering, cleansing, *or improving of any parish included in any district mentioned in Schedule B. to this act (Whitechapel District being one), or any part of such parish, now vested in any commissioners, vestry, or other body, or in any officer of any commissioners or other body, and all other duties, powers, and authorities in anywise relating to the regulation, government, or concerns of any such parish or part, or of the inhabitants thereof (except such duties, powers, and authorities as relate to the affairs of the church, or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor, so far as such duties, powers, and authorities relate thereto), now vested under any local act of parliament in any commissioners, vestry, or other body, or in any such officer, shall cease to be so vested, and shall, save as herein otherwise provided, become vested in and be performed and exercised by the board of works for such district; and the provisions of every such act of parliament as aforesaid shall be applicable to the vestry of every parish mentioned in the Schedule A., and to every such district board accordingly, and the officers of all commissioners and persons whose powers are determined by this act, shall cease and be determined, and there shall be no new appointment or election to any such office." And the 94th section provides "that all contracts, agreements, bonds, covenants, or securities made or entered into with or in favour of or by such commissioners or body, or any person on their behalf, or any such officer as aforesaid, before the commencement of this act, shall remain as valid and effectual and be proceeded on and enforced as if this act had not been passed; and no action, suit, prosecution, or proceeding commenced or carried on [*680

(*a*) The points marked for argument on the part of the defendants, were,—"that the part of the declaration demurred to is founded upon contracts entered into with the trustees of the parish of St. Mary, Whitechapel, and that the liability on such contract is not transferred to the defendants; that the 94th section of the 18 & 19 Vict. c. 120 provides that such contracts shall be proceeded on and enforced as if the act had not passed; and that the action should have been against the trustees."

by or against such commissioners or body, or any of them respectively, shall abate or be discontinued or prejudicially affected by this act, but *shall continue and take effect as if this act had not been passed; and all moneys coming to such commissioners or body under any such contract, agreement, bond, covenant, security, action, suit, or proceeding, and which would have been applicable by them if this act had not been passed for the purposes of any of the duties or powers hereby transferred to any vestry or district board, shall be paid over to such vestry or board, or as they may direct, and be applied for the like purposes; and all moneys and liabilities which such commissioners or body or officer would have been liable to pay or discharge under any such contract, agreement, bond, covenant, security, action, suit, or proceeding, out of any rates to be levied under any such powers as aforesaid, if this act had not been passed, and all costs, damages, and expenses which such commissioners or body, or any of them respectively, might, if this act had not been passed, have legally defrayed out of any such rates, shall be paid out of rates to be levied by such vestry or board as hereinafter provided." The contract declared on was entered into with the old trustees on the 4th of August, 1855, for sweeping and cleansing the streets, &c., of the parish for eleven months from the 1st of August, for the sum of 1270*l.* The Metropolis Local Management Act received the Royal assent on the 14th of August, 1855, and came into operation on the 1st of January, 1856; and this action was commenced after that day, not against the trustees under the local act, with whom the contract was made, but against the new board created under the Metropolis Local Management Act. It is submitted,—first, that, according to the plain and unambiguous language of the 94th section of that act, all contracts and covenants entered into with the trustees under any local act are to be proceeded on and enforced as if that (the general) act had not passed,—secondly, that, if that be the true *construction of the section, the court cannot look further, but must give effect to its language,—thirdly, that, even if there could be any doubt, regard being had to the ordinary mode of construing doubtful language in acts of parliament, it is sufficiently apparent that the legislature did not intend to abolish the liability of the local trustees. [CROWDER, J.—It seems absurd to continue the liability of the old trustees, when all the property and mode of raising and enforcing rates are transferred to the new board. COCKBURN, C. J.—Is there any provision in the general act for the transfer to the new board of the contracts and liabilities of the old trustees?] None. [COCKBURN, C. J.—The new rates are to be under the control of the new board. If the contract is to be enforced against the old trustees, how are they to get the money?] As provided by s. 94. The legislature, in abolishing the office of commissioners of sewers, have, in ss. 146, 148, expressly done what the plaintiff will contend ought to have been done here.(*a*) *But, if they had so intended, they would doubtless have used the same language.

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(*a*) The 146th section enacts that "no action, suit, prosecution, or other proceeding whatsoever commenced or carried on by or against the said commissioners, shall abate or be discontinued or prejudicially affected by the determination of the powers of such commissioners, but shall continue and take effect in favour of or against the metropolitan board of works in the same manner in all respects as the same would have continued and taken effect in relation to the said commissioners if this act had not been passed, and the powers of the said commissioners

[COCKBURN, C. J.—The inconvenience of the construction you are contending for would be enormous: there might be a contract extending over eight or ten years.] If the words of the statute are plain, the court cannot be induced to disregard them because it may see inconveniences which may have escaped the notice of the legislature.

Raymond, contrà.(*a*)—There can be no doubt that it *was the [*684 intention of the legislature to abolish all pre-existing local bodies, and to substitute for them district boards of works and vestries. This is clearly shown by the 90th and 95th sections.(*b*) [COCKBURN, C. J.—As regards future contracts, no doubt, the old bodies are extinguished.] All their duties, powers, and authorities are taken away by s. 90, and all their property *transferred by s. 93: and the question is [*685 whether their liability on contracts is not also transferred to the

had continued in full force; and all decrees and orders made, and all fines, amerciaments, and penalties imposed and incurred respectively previously to the commencement of this act, shall and may be enforced, levied, recovered, and proceeded for, and all administrative proceedings commenced previously to the commencement of this act shall and may be continued, proceeded with, and completed, *the metropolitan board of works being, in reference to the matters aforesaid, in all respects substituted in the place of the said commissioners.*"

And s. 148 enacts that "all property, matters, and things whatsoever vested in the metropolitan commissioners of sewers, except such sewers as are hereby vested in any vestry or district board, and except such sewers as are not within the limits of the parishes and places mentioned in the schedules to this act, shall be vested in the metropolitan board of works; and all persons who then owe any money to the said commissioners of sewers, or to any person on behalf of such commissioners, shall pay the same to the metropolitan board of works, or as they may direct; and all moneys then due and owing by, or recoverable from, the said commissioners, shall be paid by, or recoverable from, the metropolitan board of works; and all contracts, agreements, bonds, covenants, and securities theretofore made or entered into with or in favour of or by the said commissioners, and all contracts, agreements, bonds, covenants, and securities made or entered [into] with or in favour of or by any former or other commissioners, which, under the 11 & 12 Vict. c. 112, were to take effect in favour of, against, or with reference to the said metropolitan commissioners of sewers, and are now in force, shall take effect and may be proceeded on and enforced, as near as circumstances admit, in favour of, by, against, and with reference to the metropolitan board of works, as the same would have taken effect and might have been proceeded on and enforced in favour of, by, against, and with reference to the said metropolitan commissioners of sewers, if this act had not been passed, and the powers of such commissioners had continued in full force."

(*a*) The points marked for argument on the part of the plaintiff, were,—

"That, looking at the various sections of the statute 18 & 19 Vict. c. 120, and especially the 90th, 93d, 94th, and 95th sections, the liability upon the contract declared on is transferred to the defendants, and that they are, as a consequence, properly sued upon such contracts:

"That it is clear, upon these sections, that an action will lie, notwithstanding (?) the act:

"That the first branch of the 94th section is merely declaratory of a continuous efficacy of prior contracts, and of their validity to sustain an action, as well after as before the passing of the statute, and was not intended to restrict the action to the trustees:

"That, if the trustees are to be sued, this incongruity will arise, that they, having no means of payment, are liable to an action, whilst the board of works, having the means, or the power of acquiring them, and who are directed to pay by the same section, are to escape suit:

"And that, if the trustees are to be sued, the clause against abatement of action (s. 94) is superfluous; for, if they are liable to be sued after the act upon contracts made by them before the passing of the act, à fortiori would pending actions against them *not* abate; and the clause is then unnecessary."

(*b*) The 95th section enacts, that, "where, under the provisions of any local act in relation to the paving, lighting, watering, cleansing, or improving of any parish mentioned in either of the schedules A. and B. to this act, or any part of any such parish, any election or appointment of any commissioners or persons whose powers are determined by this act is appointed to take place at any time between the time of the passing of this act and the time appointed for the commencement thereof, the commissioners or persons now acting under such local act shall remain in office and perform and exercise all the duties, powers, and authorities of such act until the commencement of this act, anything in such local act to the contrary notwithstanding."

new board. The 94th section provides that all contracts made by the old body before the commencement of the act shall remain as valid and effectual, and be proceeded on and enforced as if the act had not passed; and that no action or suit commenced by or against the old body shall abate or be discontinued or prejudicially affected by the act, but shall continue and take effect as if the act had not been passed. This provision or exception would have been unnecessary, but that the legislature felt that without it existing suits would have abated. [COCKBURN, C. J.—The 93d section transfers all property to the new board. Section 94 keeps alive contracts and actions; and then goes on to provide that all moneys coming to the old commissioners under any such contract, action, &c., and which would have been applicable by them, if that act had not been passed, for the purposes of any of the duties or powers thereby transferred to any vestry or district board, shall be paid over to such vestry or board; and that all moneys and liabilities which such commissioners, &c., would have been liable to pay or discharge under any such contract, &c., out of any rates to be levied under any powers possessed by them, if that act had not been passed, shall be paid out of rates to be levied by such vestry or board as thereinafter provided. Certainly one would have expected to find some provision for transferring the liabilities: but there is none; that section leaves it in dubio upon whom the liability to be sued in respect of existing contracts rests, whether the old or the new body. It would have been easy to insert words to make the matter clear.] The only means of paying would be out of the rates made under the act, the power to make rates having been taken away from the old body. [CROWDER, J.—It certainly would *686] be somewhat *anomalous that the action should be brought against the one body, and that recourse should be had by mandamus to the other body to obtain the fruits.] By s. 94, all moneys coming to the old body are to be paid over to the new board. [COCKBURN, C. J. —That is rather against you: it imports that they have been received by the old body.] The 146th and 148th sections may fairly be prayed in aid of the construction of the earlier sections: the court will so interpret the act as if possible to make the whole harmonize. By such a mode of dealing with the language of a statute, the Court of Queen's Bench met a similar difficulty in the case of Ex parte Greenwood, 27 Law J., Q. B. 29. Here, as in that case, all difficulty will be obviated by looking to the general scope of the act.

Watkin Williams, in reply.—If the legislature had intended by the 90th and 94th sections to transfer all the existing liabilities of the old commissioners to the new board, they would have used the same expressions which they have used in the 146th and 148th sections. Martin *v.* Hemming, 24 Law J., Exch. 3, 18 Jurist 1002, shows that recourse cannot be had to extraneous matter to aid the construction of an act of parliament. It is true that the old bodies are abolished, but subject to their continuance for the purpose of all contracts, &c., into which they have entered: and they are still in existence as to the poor. If Sinnott obtains judgment here, a mandamus would lie to compel the new board to pay the money. [COCKBURN, C. J.—The old trustees have ceased to be interested. The new board alone is interested in resisting the enforcement of the contract, if it is one which ought not to be enforced. Can you suggest any reason why a different consequence should flow from

the language of the 90th, 93d, and 94th sections, from that which would result from the 146th and *148th sections?] It is impossible to [*687 suggest a reason for it: but such a construction necessarily results from the difference of language used in the different sections.

COCKBURN, C. J.—After the best consideration I have been able to give to the several clauses of the statute which bear upon this question, I am of opinion that our judgment should be for the plaintiff. The provisions on which the decision turns are no doubt involved in considerable ambiguity: but, upon the whole, I arrive without any hesitation at the conclusion I have stated. The case turns mainly upon the effect which is to be given to the 90th, 93d, and 94th sections of the act for the better local management of the metropolis, 18 & Vict. c. 120. The 90th section enacts that all the duties, powers, and authorities for or in relation to the paving, lighting, watering, cleansing, or improving of any parish, &c., now vested in any commissioners, vestry, &c., and all other duties, powers, and authorities in anywise relating to the regulation, government, or concerns of any such parish, &c., except such duties, powers, or authorities as relate to the affairs of the church, or the management or relief of the poor, or the administration of any money or other property applicable to the relief of the poor, so far as such duties, powers, and authorities relate thereto, now vested under any local act of parliament in any commissioners, vestry, &c., shall cease to be so vested, and shall, save as herein otherwise provided, become vested in and be performed and exercised by the board of works for such district. The 90th section having thus transferred to and vested in the new board all the duties, powers, and authorities, in respect amongst other things of the cleansing the streets, &c., of the parish, then comes the 93d section, which transfers to the new board all property, &c., vested in the former commissioners. Then comes the 94th *section, upon which the [*688 decision in this case mainly turns. It enacts that all contracts, &c., made or entered into with or in favour of or by such commissioners, &c., before the commencement of this act, shall remain as valid and effectual, and be proceeded on and enforced, as if this act had not been passed; and that no action, &c., commenced by or against such commissioners shall abate or be discontinued or prejudicially affected by this act, but shall continue and take effect as if this act had not been passed; and that all moneys coming to such commissioners under any such contract, &c., action, &c., and which would have been applicable by them, if this act had not been passed, for the purposes of any of the duties or powers thereby transferred to any vestry or district board, shall be paid over to such vestry or board, and be applied for the like purposes; and that all moneys and liabilities which such commissioners would have been liable to pay or discharge under any such contract, &c., action, &c., out of any rates to be levied under any such powers as aforesaid if this act had not been passed, and all costs, damages, and expenses which such commissioners might, if this act had not been passed, have legally defrayed out of any such rates, shall be paid out of rates to be levied by such vestry or board as thereinafter provided. Now, the effect of the 93d and 94th sections appears to be this,—that, all the duties, powers, and authorities of the trustees or commissioners having by s. 90 been transferred to the new board, all property to which the former body was entitled is by the 93d section transferred to and vested in the new board, and by the 94th section all contracts entered into by and with the former body

are to be kept alive; and whereas actions may have been commenced upon such contracts, the section goes on to provide that such actions shall not abate; and then it provides that all moneys coming to the old *689] *commissioners shall be transferred to, and be paid over to the vestry or new board, and that all liabilities incurred by such commissioners, shall be paid out of rates to be levied by such vestry or new board. It has been contended on the part of the defendants, that, as the contracts of the old body are kept alive, and actions pending thereon are not to abate, the old body, though for all other purposes extinguished, are still continued and kept alive with reference to such contracts. But, upon a consideration of all the provisions of the act which are applicable to the question, it appears to me that that is not the construction which ought to be put upon them. It is clear that the whole duties, powers, and authorities of the old commissioners with reference to this subject are abolished: and it is plain that the legislature considered,—otherwise they would not have enacted the 94th section,—that contracts which had been entered into by the old commissioners, and any actions which might be then pending in respect thereof, would, by reason of the 90th section, have fallen to the ground, unless kept alive by the 94th. And, when we look at the latter part of the 94th section, which provides for the discharge of the liabilities under pre-existing contracts out of the rates levied by the new board, I think the language necessarily implies that but for that provision the liability upon contracts of the former body would have been altogether at an end. The past tense is used—all moneys and liabilities which such commissioners *would have been* liable to pay or discharge under any contract, &c., if this act had not been passed. Looking, therefore, at all these provisions,—it being clear that the legislature intended to transfer to the new board all the powers and duties and all the property of the old commissioners, as well as everything that might be coming to them under contracts into which they had entered, *690] and considering also that the *legislature has charged the liabilities of the old commissioners upon the rates to be levied by the new board,—I am unable to come to any other conclusion than that the legislature intended with the transfer from the old to the new board of the powers and authorities and the property vested in the former, to transfer also the liability in respect of contracts which had been entered into by the old commissioners. We have been referred to the 146th and 148th sections as leading to a different conclusion. Those provisions relate to a different body, viz. the Metropolitan board of works, to whom the powers, &c., of the old commissioners of sewers are transferred in express language. It is said that the absence of a similar provision in the sections immediately before us shows that the legislature did not intend to transfer to the new district board all the liabilities of the former body. I must confess it does not strike me in the same way. It is impossible to suggest any real distinction between the two cases, or to imagine any substantial reason why the liability should be transferred in the one case and not in the other. The circumstance of these sections being in pari materiâ rather affords a solution of the difficulty. It would have been better, perhaps, if the language of s. 94 had been more clear and precise: but I think we may derive some assistance in construing it from some of the other clauses referred to: and one thing is perfectly clear, that, supposing this is a contract which the plaintiff is entitled to enforce against some one, it follows from the concluding part of the 94th section that

the demand must be satisfied out of the rates levied by the new board,—which fully warrants the remark I threw out in the course of the argument, that this is an idle contest upon a matter of mere form. The plaintiff's demand must be paid by somebody; and the act declares that it shall be paid out of the funds raised by the new board, the present defendants. It *clearly is most expedient that the new board should be the parties to be sued. The whole management [*691 is transferred to them, as well as the duty of protecting the funds to be levied from unjust demands. They are the parties in whom the funds are vested, and who have to administer them; and it is not only their duty but also their interest to see that they are properly applied. I therefore think that in point of policy and expediency they should be liable to be sued. And, at all events, we have the satisfaction of knowing that in so holding we shall be doing no injustice; for, sooner or later the claim in question must have been enforced against the funds of the new board. Upon these grounds, I am of opinion that the reasonable construction of the act, for all practical purposes, is, to hold that the present action is well brought against these defendants.

WILLIAMS, J.—I am entirely of the same opinion. The main stay of Mr. *Watkin Williams's* argument is the 94th section, which comes by way of proviso on the 90th, whereby all the duties, powers, and authorities in relation to the matters now in question are transferred from the old trustees or commissioners to the new board to be appointed under the 18 & 19 Vict. c. 120. It is insisted that the words of the 94th section are too strong to be got over. That section provides that all contracts made or entered into with or in favour of or by the old commissioners before the commencement of the act, shall remain as valid and effectual, and be proceeded on and enforced, as if the act had not been passed. If it is to be taken literally that all contracts are to be enforced in the same mode as before the passing of the act, undoubtedly there would be an end of the argument. But it does not expressly say so; and we find that followed by a provision which I think fairly enables us to put upon the 94th section a *construction which convenience and [*692 justice undoubtedly requires, and justifies us in concluding that the liability to be sued in respect of existing contracts, except as to actions already commenced, is transferred to the new board, and consequently that this action is properly brought against them.

CROWDER, J.—I also think we may reasonably put upon this statute the construction which convenience requires. Looking at the whole purview of the statute, it cannot be doubted that it was intended altogether to abolish and extinguish the old body, and to transfer all its powers and duties, rights and liabilities, to the newly created board: and, but for the 94th section, it could hardly have been doubted that that intention was completely and thoroughly carried out. All the duties and powers of the old body are transferred by the 90th section, and all their property by the 93d. That made the old body a mere nonentity, except as to the affairs of the church and the relief of the poor. The real meaning of the 94th section, I apprehend, is, that all contracts made by or with the former body shall continue as binding as if the act had not been passed. But then it is urged that the legislature go on to say that they shall be proceeded on and enforced as if the act had not been passed, and consequently that they are to be enforced precisely in the same way as before.

That, as it appears to me, is by no means a necessary consequence. The meaning, I think, is, that the contracts shall remain as valid and effectual and be enforceable as if the act had not passed,—in other words, that contracts made by the former body shall not be vacated in consequence of their having ceased to exist as a body. Then, as to existing actions, the clause provides that they shall not abate or be discontinued or prejudicially affected by the act: but the subsequent part provides *that
*693] the liability thereon shall be defrayed out of the rates to be levied by the new board. The simple question, therefore, is, who are to be the formal parties to be sued? It does not appear to me that we are constrained by any language of the statute to hold that the action must necessarily be brought against the old body, when every effect can be given to it by holding that it may be brought against the new board, from whom the fruits of the judgment must ultimately be obtained. Upon the best consideration I can bring to the question, I am of opinion that the new board are properly made defendants in this case, and that consequently our judgment must be for the plaintiff.

WILLES, J.—For the reasons given by the rest of the court, I concur in thinking that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

In the matter of JOSEPH HARRIS and Another and THE COCKERMOUTH AND WORKINGTON RAILWAY COMPANY.—*Jan.* 15.

A railway company agreed with the lessees of certain collieries to carry their coals at a somewhat lower rate of tonnage than they carried for others, in consideration of the owner of those collieries having laid out a large sum in constructing tram-ways to connect them with the railway: they also made a further reduction, under the influence of a threat, that, unless they acceded to the terms proposed by the lessees, the owner would construct another line of railway direct from the collieries to the place of shipment, for the use of his tenants, and so would divert from the company a very considerable and essential portion of their traffic:—Held, that neither of these was a justifiable reason for the "undue preference" thus given.

A RULE was obtained in Trinity Term last, calling upon the Cockermouth and Workington Railway Company to show cause why a writ of injunction should not issue against them pursuant to the Railway Traffic
*694] *Act, 1854, 17 & 18 Vict. c. 31, enjoining the said company to desist from giving to Isaac Fletcher and William Fletcher an undue preference for or in respect of the carriage of coals on the railway of the defendants, and enjoining the company to carry coals for the complainants upon equal terms with the said Messrs. Isaac Fletcher and William Fletcher, having due regard to the circumstances, if any, which rendered the cost to the defendants of carrying coals for the said Isaac Fletcher and William Fletcher less than the cost of carrying for the complainants,—with costs.

The affidavits upon which the rule was obtained were in substance as follows:—

A line of railway from Cockermouth to the port and harbour of Workington, about eight miles in length, and called The Cockermouth and Workington Railway, was constructed by the defendants by virtue of an act of the 8 & 9 Vict. c. cxx., and is worked and managed by and under the control of the defendants.

The complainants are proprietors of a colliery called the Millbanks Colliery, situate at Greysouthern, in Cumberland, adjacent to the said line of railway, from which colliery they raise large quantities of coals.

For the more ready conveyance of coals from their colliery to the railway, a siding of about 475 yards in length, and distant 759 yards from the complainants' said Millbanks Colliery, was constructed by the company at the joint expense of the company and the complainants, under an agreement by which the latter agreed to pay to the former annually, for the use of the said siding, a sum equal to 7½ per cent. on the amount expended by the company for their share of the expense of constructing the said siding, which is called the Marron Siding.

The said Marron Siding extends from a point near the complainants' colliery to, and joins the railway at, *a point called the Marron Junction, distant about 3 miles and 1519 yards from Cockermouth, and about 4 miles and 1120 yards from Workington Harbour. [*695

The Cockermouth and Workington Railway Company allow the complainants to take their wagons from their line to that end of the Marron Siding which is near to their colliery, to be filled with coals; and, when so filled, they are propelled along the siding, partly by the complainants' own power and partly by power supplied by the company, to the Marron Junction, from which point they are carried by the company along their line to a place thereon called the Harry Gill Junction, and thence to a point on the line called the Lowther Junction, and thence along the said company's line to Workington Harbour, where they are disposed of by the complainants.

The said company have for a long time charged to and exacted from the complainants at the rate of 3*s.* $9\frac{9}{11}$*d.* per wagon of 60 cwt. for the conveyance of the said coals from the Marron Junction to Workington, being at the rate of $3\frac{3}{11}$*d.* per ton per mile, for such conveyance of the said coals. The company have never charged the complainants anything in respect of their allowing them to take their wagons to the end of the Marron Siding to be filled, or in respect of the use of their wagons for the purpose of conveying their coals in them along the said siding to the Marron Junction, or in respect of the power by which the wagons are propelled in part along the Marron Siding to the Marron Junction.

Messrs. Isaac and William Fletcher are the lessees of several collieries situate near to the said Millbanks Colliery, and adjacent to the Cockermouth and Workington Railway; and the coals from the said collieries are raised from several shafts called the "Bridgefoot Pit," "Harry Gill Pit," "Clifton Pit," and "Lowther Pit."

*Bridgefoot Pit is 926 yards from the Marron Siding; and the Messrs. Fletcher bring their coals in carts from the said Bridgefoot Pit to the Marron Siding, and load their coals on wagons at the same point on the Marron Siding as the coals from the complainants' colliery are loaded. [*696

The company allow the Messrs. Fletcher to take their (the company's) wagons to the point on the Marron Siding at which they so load them; and the said Messrs. Fletcher, having loaded the said wagons with coals there, send them along the said Marron Siding, partly by means of the complainants' power and partly by means of power supplied by the company, to the Marron Junction, from which point they are carried by

the company along the railway in their wagons to Workington Harbour, where they are disposed of.

The coals so obtained by the Messrs. Fletcher from the Bridgefoot Pit, and so carried on the railway, are conveyed to Workington Harbour on the same part of the said line, and for the same distance precisely, as the coals so obtained by the complainants from their said colliery are carried along the said line.

The company never charged Messrs. Fletcher anything in respect of allowing them to take their (the company's) wagons to be filled on the Marron Siding, or in respect of the use of their wagons for the purpose of carrying their coals along the siding to the Marron Junction, or for the power by which the said coal is so in part propelled by the company along the siding to the Marron Junction.

Messrs. Fletcher pay the complainants for the use of the said siding, and for trimming, and so in part propelling the said wagons when so filled along the Marron Siding, a sum agreed upon between them. The complainants' coals and the coals of the Messrs. Fletcher are propelled
*697] by means of the complainants' power the *same extent of distance along and on the same portions of the Marron Siding, and are also propelled by means of the power of the company the same extent of distance along and over the same portions of the Marron Siding; and there is no difference in the extent of the application of the power of the company in propelling Messrs. Fletcher's coals along the siding, and in propelling the complainants' coals along the said siding.

The Harry Gill Pit is situate about 230 yards from the railway; and Messrs. Fletcher bring their coals from that pit upon the line by a wagon-way belonging to them, extending from the Harry Gill Pit to a point on the line called the Harry Gill Junction, being a point on the line about 293 yards nearer to Workington Harbour than the Marron Junction.

The said coals of Messrs. Fletcher are conveyed along the said wagon-way by power provided by the company to the Harry Gill Junction, whence they are carried by the company on their wagons along their line to Workington Harbour, and are there disposed of by Messrs. Fletcher.

The company allow the Messrs Fletcher to take their wagons on the Harry Gill wagon-way to be filled, and to take their coals in the said wagons along the said wagon-way to the Harry Gill Junction, without any charge.

The coals of Messrs. Fletcher obtained from the Harry Gill Pit are carried from the Harry Gill Junction to Workington Harbour along the same portion of the company's line as the coals obtained by the complainants from their colliery are carried from the said Harry Gill Junction.

The Lowther Pit and Clifton Pit are situate respectively, the said Lowther Pit about 318 yards from the railway, and the Clifton Pit about 1008 yards from the Lowther Pit; and the coals obtained at the
*698] Clifton Pit *are conveyed by the Messrs. Fletcher on a tram-way and in wagons belonging to them to the said Lowther Pit; and the Messrs. Fletcher have a wagon-way extending from the Lowther Pit to a point in the line called the Lowther Junction, about 645 yards

nearer to Wokington Harbour than the Marron Junction; and the said Messrs. Fletcher bring their coals from the said Lowther Pit and Clifton Pit upon the said line by means of their said wagon-way, partly by their own power and partly by the power of the said railway company, to the Lowther Junction; and the same are carried thence by the company in their wagons to Workington Harbour, where they are disposed of.

The company allow Messrs. Fletcher to take their (the company's) wagons on the wagon-way to the Lowther Pit for the purpose of the same being loaded with coals from the said Lowther Pit and Clifton Pit, and allow them to take their said coals to the Lowther Junction, without any charge.

The coals of the Messrs. Fletcher obtained from the Lowther Pit and Clifton Pit are carried from the Lowther Junction to Workington Harbour along the same portion of the line as the coals obtained by the complainants from their colliery are carried from the said Lowther Junction.

The Cockermouth and Workington Railway Company have entered into an agreement with Messrs. Fletcher, which took effect from the 1st of November, 1856, whereby the rates agreed to be charged by the company to the Messrs. Fletcher, for the conveyance of coals to the harbour at Workington from the Marron Junction, the Harry Gill Junction, and the Lowther Junction, respectively, are 3*s.* 4*d.* per wagon of 60 cwt. when the quantity conveyed by the said Messrs. Fletcher on the said line from all or any of the said junctions in any one day does not exceed sixty wagon-loads per *day on an average of some number of days to the year agreed upon between them, and 2*s.* 10*d.* per wagon of 60 cwt. when the quantity conveyed on the line by the Messrs. Fletcher in any one day from all or any of the said junctions shall not exceed on such average one hundred and twenty wagon-loads, and 2*s.* 6*d.* per wagon of 60 cwt. when the quantity conveyed on the said line by the Messrs. Fletcher in any one day from all or any of the said junctions shall exceed on such average one hundred and twenty wagon-loads. [*699

The said rate of 3*s.* 4*d.* per wagon of 60 cwt. is at the rate of 2$\frac{1}{8}$*d.* per ton per mile for the carriage of the said coals for the Messrs. Fletcher on the said line from the Marron Junction to Workington Harbour, and is at the rate of 3$\frac{1}{10}$*d.* per ton per mile for the carriage of the coals for Messrs. Fletcher from the Harry Gill Junction to Workington Harbour, and is at the rate of 3$\frac{1}{8}$*d.* per ton per mile for the carriage of the said coals on the said line for Messrs. Fletcher from Lowther Junction to Workington Harbour.

The said rate of 2*s.* 10*d.* per wagon of 60 cwt. is at the rate of 2$\frac{1}{2}$*d.* per ton per mile for the carriage of the said coals for Messrs. Fletcher on the said line from Marron Junction to Workington Harbour, and is at the rate of 2$\frac{1}{10}$*d.* per ton per mile for the carriage of the coals for Messrs. Fletcher from Harry Gill Junction to Workington Harbour, and is at the rate of 2$\frac{3}{10}$*d.* per ton per mile for the carriage of the said coals on the said line for Messrs. Fletcher, from Lowther Junction to Workington Harbour.

The said rate of 2*s.* 6*d.* per wagon of 60 cwt. is at the rate of 2$\frac{1}{8}$*d.* per ton per mile for the carriage of the said coals for Messrs. Fletcher on the said line from Marron Junction to Workington Harbour, and is

at the rate of 2½*d.* per ton per mile for the carriage of the said coals
*700] for Messrs. Fletcher from Harry Gill Junction to *Workington Harbour, and is at the rate of 2⅛*d.* per ton per mile for the carriage of the said coals on the said line for Messrs. Fletcher from the Lowther Junction to Workington Harbour.

In the report of the directors of the said Cockermouth and Workington Railway Company to the shareholders at their last half-yearly meeting, held on the 31st of January, 1857, occurs the following passage having reference to the agreement with Messrs. Fletcher:—"The shareholders are already aware that an agreement was recently entered into between the directors and Messrs. J. & W. Fletcher for the conveyance of the coals from the Clifton and Crossbarrow collieries over the railway at a fixed scale of charges. The Messrs. Fletcher had long ago been dissatisfied with the amount of the rates charged upon the coals from their collieries adjoining the line; and some months ago they applied for a considerable reduction, stating at the same time that they had represented the matter to their landlord, the Earl of Lonsdale, who gave his approval to the terms they were prepared to offer, and, in the event of the refusal of those terms by the board, he would construct a private tram-way to Workington for the use of his tenants. The alternative of submitting to the required reduction, or of losing the whole of Messrs. Fletcher's traffic, on which the prosperity of the line so much depends, claimed the long and anxious consideration of the board. After mature deliberation, and a careful inquiry of competent authorities into the actual cost of the carriage of coals, as well as a comparison of the proposed rates with those charged upon other railways and under similar circumstances, and after fully convincing themselves of Lord Londale's bonâ fide intention to lay down a tram-way if these rates should not be accepted, your directors believed they had no other
*701] course to adopt than the one to which they eventually *assented; and our agreement with the Messrs. Fletcher, dating from the 1st November last, received the seal of the company. Your directors remain firmly of opinion, that by this arrangement, they best served the interests committed to their charge. The present rates are as high as the average rate previously received upon the coals from Clifton and Crossbarrow collieries: they are within a fraction of a penny of the estimated average calculated upon in the original prospectus of the company, and higher than the rates charged upon the Newcastle and Carlisle and Whitehaven Junction Railways: and there is every reason to feel satisfied that they will prove remunerative to the company when the rolling stock and permanent way are fully restored to proper working condition."

In consequence of the difference between the rates charged to the Messrs. Fletcher and to the complainants, the latter are obliged to sell their coals at a proportionably less profit than the Messrs. Fletcher sell theirs, in order to keep in the market, and the Messrs. Fletcher gain a proportionably greater profit than the complainants do; and by such difference of rates the Messrs. Fletcher obtain an undue and unreasonable preference and advantage, and the complainants are subjected to an undue and unreasonable prejudice and disadvantage, notwithstanding that the circumstances under which the coals are so carried by the company do not render the cost to them of so carrying for the Messrs.

Fletcher less than the cost to them of so carrying for the complainants, or, at all events, do not so far reduce such cost as to justify or render reasonable so great a difference between the charges so made to the Messrs. Fletcher and the charges so made to the complainants, as before stated.

Upon discovering the nature of the agreement between the company and the Messrs. Fletcher, the complainants *applied to them to be put upon the same footing; but the company declined to alter their charges. [*702

Manisty, Q. C. (with whom was *Bovill*, Q. C.), showed cause, upon affidavits stating, amongst other things, that the Cockermouth and Workington Railway extends from Cockermouth to Workington Harbour, and is eight miles and a half in length; that the cost of its construction was 107,000*l.* and upwards, and 9000*l.* and upwards has been expended in the construction of quays and other conveniences at the Workington Harbour, and that the coal and lime sent to Workington Harbour pass over a portion of the Whitehaven Junction Railway, for which a charge of 1½*d.* per wagon is paid by the company, and therefore the terminal expenses of the coal traffic are great in proportion to the rates charged for coals conveyed by the company to Workington Harbour, and that a terminal charge of 1*s.* 2*d.* per wagon ought to be deducted in all cases from the rate charged by the company before a mileage rate can be calculated and ascertained: That the gross revenue of the company for the year ending the 31st of December, 1856, was 10,593*l.* 12*s.* 7*d.*, and the gross revenue derived from the carriage of the Clifton and Crossbarrow coals to the harbour of Workington is after the rate of 3000*l.* and upwards per annum, and that the said coal traffic is increasing and consequently forms an important part of the company's revenue: That the Clifton Colliery is the property of the Earl of Lonsdale, and the Messrs. Fletcher became lessees thereof on the 5th of March, 1856, and had been lessees of the adjoining colliery called Crossbarrow Colliery from the year 1853; that the Clifton Colliery was worked by means of a shaft called the Old Clifton Pit from the year 1848 down to October, 1855, when a new shaft was opened, contiguous to the railway, called the Lowther Pit, and the colliery is *worked by means of both shafts; that the Crossbarrow Colliery was worked by means of a shaft called the Crossbarrow Pit from 1853 down to February, 1855, when a new shaft was opened contiguous to the railway, called Harry Gill Pit; and that the Clifton and Crossbarrow pits are distant from the railway about a mile each: That the Lowther Pit siding junction is 4¼ miles from Workington, the Harry Gill siding junction 4½ miles, and the Marron Siding junction, where the coals of the complainants are brought upon the railway, 4¾ miles from Workington; but inasmuch as the company's engines do not leave the railway for the Harry Gill coals, and travel at least 400 yards on the Marron Siding for the coals of the complainants, the company's engines draw the coals from the Marron Siding to Workington *nearly half a mile further* than those from Harry Gill, and nearly *three quarters of a mile further* than those from the Lowther Pit; and that the shunting at the Marron Siding is also more difficult and expensive: That the Clifton Pit coals have been conveyed by the railway to Workington Harbour from 1848 down to November, 1856, and during that period they were loaded at the Marron Siding, and were conveyed by the railway the same dis- [*703

tance and in the same manner as the coals of the complainants loaded at the same siding; and that the Crossbarrow Pit coals from the time they were conveyed by the railway to Workington Harbour were loaded at the Marron Siding, and conveyed by the railway the same distance and in the same manner as the coals of the complainants: That, between the year 1848 and April, 1853, the complainants were charged 3*s.* 8*d.* per wagon of 52 cwt., and the Earl of Lonsdale as occupier of the Clifton Pit 2*s.* 3*d.* per wagon of 52 cwt. for coals conveyed by the railway company from the Marron Siding to Workington Harbour; and that, between the 1st of April, 1853, and the 1st of November last, the
*704] *complainants were charged 3*s.* 6*d.* per wagon of 55 cwt., and the Earl of Lonsdale and the Messrs. Fletcher, as his lessees of Clifton Pit, 2*s.* 3*d.* per wagon of 55 cwt. for the coals conveyed by the company from the Marron Siding to Workington Harbour: That the Clifton Pit is about 3¼ miles from Workington by the turnpike-road, and about 1¼ miles from the Marron Siding; and that there was a competition between the company and carts for the carriage of the Clifton coals to the harbour of Workington, and it was the low rate of 2*s.* 3*d.* per wagon alone which secured the carriage of these coals by railway: That the Crossbarrow Pit was also about 3¼ miles from Workington by the turnpike-road, and about 1 mile from the Marron Siding by road; that, on the 1st of April, 1853, the rate for the carriage of the Crossbarrow coals from the Marron Siding to Workington Harbour was fixed at 2*s.* 9*d.* per wagon of 55 cwt.; that, at such rates, the carts competed with the railway company for the carriage of the Crossbarrow coals to Workington Harbour, and large quantities were sent there by cart from Crossbarrow; and that, in October, 1853, the Crossbarrow rate was reduced to 2*s.* 7*d.* per wagon, but the carts still continued the competition until January, 1855, the rate was reduced to 2*s.* 4*d.* per wagon, when the competition by cart ceased: That the rates for the carriage of coals by the company from the Lowther Pit and Harry Gill Pit respectively to Workington Harbour were fixed at 3*s.* 6*d.* per wagon of 55 cwt., being the same as that charged to the complainants for coals sent from the Marron Siding: That, in 1853, the weight per wagon from the different collieries was increased to 58 cwt., and a proportionate increase was made upon the rates from all the said collieries: That, in 1856, in consequence of the Messrs. Fletcher constructing a tram-way connecting the Crossbarrow and Clifton Old Pits with the railway, the
*705] *company agreed to charge them 6*d.* per wagon less for coals brought by that tram-way and sent to Workington Harbour than for coals sent there from the Lowther Pit: That, in 1856, the weight per wagon of coals was increased from 58 cwt. to 3 tons by all the coal-owners, and in September last a corresponding increase in the different rates charged to the complainants and the Messrs. Fletcher and other coal-owners on the railway, was made: That shortly afterwards it was intimated to the company, that, unless they would consent to carry coals for Messrs. Fletcher according to a given reduced scale, the Earl of Lonsdale was prepared to make a tram-way or railway whereby the whole of the traffic from the Clifton and Crossbarrow collieries would be withdrawn from the railway: That, after much consideration, and after a deputation of the directors had satisfied themselves by a personal interview with Lord Lonsdale that there was a bonâ fide intention on his part

to construct such tram-way or railway, the board agreed with the Messrs. Fletcher to charge the following rates for every wagon of coals of 3 tons weight raised from the Clifton and Crossbarrow collieries, and conveyed by the railway to Workington Harbour, from and after the 1st of November last, viz. "If the daily average (according to the number of working days in the preceding half-year ending with the 31st of December, 1856, or, as the case may be, in the next preceding year ending with the 31st of December, 1857, or in any subsequent year) of the quantity of coals and coke conveyed during such preceding half-year, or, as the case may be, such preceding year, be less than sixty wagon-loads of three tons each, then for all round coals and coke 3*s.* 4*d.* for every wagon-load; and for all small coals, 2*s.* 10*d.* for every wagon-load: But, if that daily average be more than sixty wagon-loads of 3 tons each, then for all round coals and coke, 2*s.* 10*d.* for every wagon-load; and for *all small coals, 2*s.* 4*d.* for every wagon-load: But, if [*706 that daily average shall be 121 wagon-loads or more of 3 tons each, then for all round coals and coke 2*s.* 6*d.* for every wagon-load; and for all small coals, 2*s.* for every wagon-load:" That the low rates charged for the carriage of coals from the Clifton and Crossbarrow pits arose solely from the competition by cart for the carriage of those coals to Workington Harbour; and that the rates offered by the Messrs. Fletcher for the carriage of the coals from Harry Gill and Lowther Pit sidings respectively were accepted and agreed to solely on account of the threatened abstraction of the whole of their coal traffic from the railway by the construction of a tram-way from the collieries to the harbour of Workington, and not from any desire or intention on the part of the company to give to the Messrs. Fletcher any undue preference or advantage whatsoever: That the quantity of coals carried by the company for the complainants from the Marron Siding to the harbour of Workington from the 1st of November last to the 23d of May last, is 2244 wagons, equal to a daily average of 13 wagons; and that the quantity carried by the company to the same place during the same period from the Harry Gill and Lowther Pit sidings, is, 11,255 wagons, equal to a daily average of 65 wagons: That the mileage rate under the said agreement from the Lowther Pit Siding on a daily average of sixty wagons, after deducting 1*s.* 2*d.* per wagon for terminal charges and expenses, is, 2*d.* and a small fraction per ton per mile, from Harry Gill a small fraction less than 2*d.* per ton per mile, and a proportionate rate for coals carried to the harbour from the Marron Siding, including that siding, would be 2*d.* and a fraction per ton per mile: That the company's engines draw a load of 50 wagons and upwards to the harbour of Workington, and it is more profitable to take a full load than small *loads of [*707 13 to 20 wagons: That the Messrs. Fletcher have during the last six months drawn a small quantity of coals from a pit called the Bridgefoot Pit, which were loaded at the Marron Siding, and they have paid for these coals the same rate per wagon as the company charge the complainants for coals conveyed by railway from their colliery at Millbanks; and that no other coals have been loaded since the 1st of November last at the Marron Siding by the Messrs. Fletcher: That the limited amount of traffic given to the line by the complainants rendered the cost to the company of working such traffic more than the cost of working the traffic from the Harry Gill and Lowther Pit sidings, where the company can

always calculate upon obtaining a full train of wagons from those sidings to Workington: And that the refusal of the rates offered by the Messrs. Fletcher would deprive the company of a principal source of revenue.

The affidavits show that the rates for the carriage of coals from Millbanks and Bridgefoot pits, which are the only two that use the Marron Siding, are alike. Less is charged from Lowther and Harry Gill pits. The circumstances are different with respect to these two, as contrasted with Millbanks and Bridgefoot, as well as to distance as to the quantities of coal carried for the respective parties, which, of course, involves a difference in the cost to the company. The distances, it appears, are as follows,—from Lowther siding to Workington terminus, 4¼ miles; from Harry Gill, 4½ miles; and from Marron Siding, 4¼ miles; and Marron Siding, along which the empty wagons have to be shunted, is 475 yards. The quantities sent are,—by the complainants, 13 wagons of 3 tons each per day, and by the Messrs. Fletcher 65 wagons of 3 tons each per day. The Messrs. Fletcher, it appears, are tenants or lessees *708] under the Earl of Lonsdale; and, the Earl having intimated *an intention to construct another line of railway for the use of his tenants, which would have the effect of diverting a large portion of the traffic from the defendants' railway, the company consented to diminish the rate of charge, rather than incur the risk of the line being altogether closed. The main question, therefore, will be, whether it is an "undue preference" within the act, if the proprietors of a railway constructed for the mineral traffic of the district give parties who might send their coals to the place of shipment without using their railway such facilities in the way of a diminished charge or otherwise as will induce them to use the line; always supposing that the company are acting bonâ fide and with a view to their own interest and that of the public. It is sworn that the loss which would accrue to the company from the withdrawal of the carriage of the Messrs. Fletcher's coals, would amount to nearly one-third of their entire revenue. [COCKBURN, C. J.—Can that be a justifiable reason for putting Lord Lonsdale's tenants upon a better footing than the rest of the public?] The interests of the complainants themselves would suffer if Lord Lonsdale's projected tram-way were made, inasmuch as he could carry his tenants' coals at a lower rate than they are now carried by the company, and so the Messrs. Fletcher would be the better able to compete with them in the market.(*a*) In putting a construction upon this act, the court will take a comprehensive view of the whole case, and of all the surrounding circumstances. [CROWDER, *709] J.—The alternative you put *is not the true one: the question is, not what you would lose if deprived of the carriage of Messrs. Fletcher's coals, but what loss of revenue you would sustain if you reduced the charge to the complainants to the same rate.] Such a reduction would not meet the requirements of Lord Lonsdale's tenants: and, besides, the company would have to reduce the charge to *all* its customers. [WILLIAMS, J.—The company have constructed a railway which admits of competition: and you buy off the chance of that result

(*a*) It was sworn that the whole of the land between the pits and Workington Harbour was the property of Lord Lonsdale, except one small piece, of which Messrs. Fletcher had obtained a ninety-nine years lease. On the other hand, it was stated that the proposed tram-way or railway would have to cross two turnpike-roads and the Whitehaven Junction Railway; and therefore an act of parliament would be necessary.

by giving to one set of persons the means of underselling another set.] The object is, not to enable the Messrs. Fletcher to undersell the complainants, but to place the former upon the same footing as the latter. [COCKBURN, C. J.—Your argument would deprive a man of his natural advantages. Suppose a man residing at a place equidistant from two railways, holds out to one of them, that, unless they will give him certain advantages, he will travel by the other,—would that be a reasonable thing for the company to be influenced by? There is hardly a railway in the kingdom where this might not occur.] If it be shown that no injustice is done, and that the act complained of is solely dictated by a fair and bonâ fide regard to the just interests of the company, and not by an intention to give an undue preference, and that there is a peculiarity and a difference in the circumstances, the court will be slow to come to the conclusion that there has been an infringement of the statute. In Ransome's Case, 1 C. B. N. S. 437 (E. C. L. R. vol. 87), and in Oxlade's Case, 1 C. B. N. S. 454, it was distinctly laid down by the court that the fair interests of the company are to be taken into the account in considering whether the circumstances under which goods are carried justify a different rate of charge in one case from another; as, for instance, where it is made to appear that the circumstances enable the company to carry for one party at a less cost to themselves *than [*710 the cost of carrying for another. If there *can* be a case for the application of that doctrine, it is this. The Caterham Case, 1 C. B. N. S. 410 (E. C. L. R. vol. 87), and Hozier *v.* The Caledonian Railway Company, Scotch Sessions Cases, Vol. 17 (N. S.), p. 302, show, that, to constitute an undue preference within the act, by reason of an inequality of charge, the inequality must be in the charge for travelling over the *same* line or the *same portion* of the line, and the party complaining must show some personal disadvantage to himself. Here, the difference of charge is in same measure accounted for by the increased distance over which the complainants' coals travel: and it is justified as well by the large outlay made by Lord Lonsdale in order to bring his collieries within reach of the railway, as by the consideration of expediency in order to avert the ruin which would result to the company from the threatened competition of the proposed tram-way from his lordship's pits to Workington.

Hugh Hill, Q. C., and *T. Jones*, were not required to support the rule.

COCKBURN, C. J.—I am of opinion that this rule must be made absolute. The facts to be gleaned from the affidavits are tolerably clear. The complainants are proprietors of a colliery adjoining the defendants' railway, and the Messrs. Fletcher are lessees under the Earl of Lonsdale of certain other collieries also adjacent to the railway, and the coals belonging to each are carried along the line from the points at which their respective tram or wagon ways intersect the railway to Workington Harbour. It is admitted that the charge made by the company to the complainants for the conveyance of their coals is higher than the rate which is charged by them to the Messrs. Fletcher. Primâ facie, that shows a case of undue preference, within the *statute: and the [*711 question is, whether the company have shown any sufficient reason or justification for this difference of charge. Three grounds of justification are put forward by the company. The one is, that the colliery of the com-

plainants is at a greater distance from the terminus than those of the Messrs. Fletcher. That ground, however, fails in point of fact; for, there is nothing to show that the excess of charge made to the complainants over that made to the Messrs. Fletcher bears any proportion to the difference of distance of their respective collieries. Then it is said that Lord Lonsdale has been induced to desist from carrying coals from his collieries to Workington by another route, and to use the defendants' railway for that purpose, and also to make certain works to facilitate their conveyance to the railway, in consideration of an agreement by the company to carry his coals along their line at a somewhat lower rate than that which they charge to the adjoining proprietors. Further it is said, as a justification for the difference of charge, that Lord Lonsdale had threatened the company, that, unless they would agree to carry coals from his collieries at such lesser rate of charge, he would construct another line of railway for the use of his tenants. I have already said that the first ground of justification fails in point of fact: and I think the other two fail to furnish any justification in point of law for the course pursued by the company. The court has already intimated, if not absolutely decided,(*a*) that a railway company is entitled, in determining the rate of tolls they will impose upon any particular traffic, to take into consideration any circumstances either of a general or a local
*712] character which may enable them to charge less in some *cases than in others. As, for instance, if a company were to lay down a rule, that, if a given quantity of coal or any other commodity were brought to them to be carried at one time, or at regular intervals, they would charge for it at a lower rate than they would charge for a smaller quantity, or for goods brought at uncertain times, in consideration of the difference of cost of working the line: that might be a fair and legitimate ground for a difference of charge. So also, if a company made a difference in the rate of charge between terminal and intermediate traffic, there might exist fair reasons to justify them in so doing. As to the former, there might be competition with another line, which would make it their interest to reduce the charge to the lowest possible scale, or increased traffic which would enable them to carry cheaper in proportion to the distance. But these are all cases in which the whole public is treated with perfect equality; and they differ very materially from the present case. Here, the collieries are all situate in the same locality, and the coals from all of them are carried under precisely the like circumstances; but a difference is made in the charge for carriage in favour of Lord Lonsdale's tenants, because otherwise it is feared that Lord Lonsdale or his tenants will abstain from sending their coals by the defendants' railway, and will send them by some other route, or by a railway which Lord Lonsdale would be induced to construct for that purpose. In my opinion that is not a sufficient ground for the preference so given. The company are bound to regulate their charges so as to be equally applicable to all persons similarly circumstanced. If we were to take into consideration the circumstances upon which the company rely for their justification, there is no case in which we might not be called upon to consider the circumstances which might influence a party

(*a*) See Ransome's Case, 1 C. B. N. S. 437 (E. C. L. R. vol. 87), and Oxlade's Case, 1 C. B. N. S. 454.

to send his goods by a *particular railway: every man would be making his own bargain; and it would always be a question how far the company were justified in the particular case in departing from the general rule. I do not think it was the intention or the policy of the legislature to permit railway companies to make private bargains to give advantages to individuals which must be attended with corresponding disadvantages to others. The obvious intention was, that there should be an equal rate of charge in respect of the carriage of all goods under the like circumstances; and that, although the company may be justified in laying down special rules as applicable to particular cases, provided that they bonâ fide act with reference to their own interest and the interests of the public, they are not at liberty to make special bargains with individuals whereby one is benefited, to the prejudice of another. I think the grounds put forward by the company are not sufficient to justify the preference they have given to Lord Lonsdale's tenants over the complainants, and that the rule for an injunction must be absolute. [*713

WILLIAMS, J.—I am of the same opinion. I think Mr. *Manisty* has not succeeded in showing that the present case is in substance any more than this,—that the company do in point of fact prefer the Messrs. Fletcher to the complainants, by charging lower rates for the carriage of coals for the former than they do for the latter: and the question is, whether that amounts to an "undue preference." I assume that there is no undue or improper motive; but that the company carry coals for the Messrs. Fletcher at a lower rate than they do for the complainants, simply because they are apprehensive, that, if they do not give such preference to the Messrs. Fletcher, Lord Lonsdale, who is their landlord, will construct another line of railway, and so *withdraw from the defendants' line a large portion of the traffic. The question is, whether a preference given under such influence is not undue. I think it is; and that to hold otherwise would be to introduce a principle whereby a railway company might give a preference in every case where they bonâ fide considered that it would be to their advantage to do so. For this and the other reasons pointed out by my Lord, I am of opinion that this expectation of what Lord Lonsdale will otherwise do, affords no answer to the objection of undue preference. It is further urged, on the part of the company, that expense has been incurred by Lord Lonsdale in making tram-ways for the purpose of approximating his pits to the railway, and that the company are justified in taking that into their consideration, and making an allowance to his tenants in the shape of a reduced charge. I think that *is* an undue preference. It must be borne in mind that the making of a railway is a violation of the common law of the land, which is permitted only in consideration of the general benefit accruing to the public. And, where a man acquires an advantage by reason of the proximity of his land to a railway, his right to the enjoyment of that advantage is one which nobody can lawfully disturb or diminish. It would be manifestly unjust if it were not so: for, the proprietor of the land may have been induced by the prospect of this advantage to withdraw or abstain from opposition to the bill for making the railway. By doing that which they have done here, the Cockermouth and Workington Railway Company are virtually depriving the complainants of the natural advantage of their position; and therefore [*714

I concur with my Lord in thinking that the second ground urged on the part of the company gives no warrant for holding this not to be an undue preference, and consequently that the rule for an injunction must be made absolute.

*715] *CROWDER, J.—I also think that this rule should be made absolute. In giving the reasons which have induced me to arrive at this conclusion, I do not profess to lay down a definition of the term "undue preference," which will govern every case that may be brought before us. It would be very difficult to do that: but, of this there can be no doubt, viz., that undue preference is not to be confined to the mere desire to benefit the individual. It is said here that no favour or partiality has been shown to the Messrs. Fletcher as against the complainants, and therefore the conduct of the defendants is not brought within the statute. That, however, by no means follows. Then it is urged that it is competent to the railway company to take into their consideration circumstances which vary the position of one individual from that of another, and make a difference in their charge accordingly. I apprehend that they cannot do any such thing. If the company might do so as to goods, they might equally do so as to passenger traffic; and, inasmuch as no two cases would be precisely alike in circumstances, the result might be that no two persons would be charged alike. That, therefore, cannot be the principle upon which the company are to regulate their charges. I agree with my Brother Williams, that every proprietor whose land is situate near a line of railway acquires a fair right to the natural advantages resulting from such proximity, and that he is not to be deprived of that advantage by a bargain between the company and an individual at a greater distance to approximate him by means of a diminished charge. In one of the earliest cases that came before us under this statute,—Ransome's Case, 1 C. B. N. S. 437 (E. C. L. R. vol. 87), and in Oxlade's Case, 1 C. B. N. S. 454, we laid it down, that, in determining the propriety of varying their charges, it was fair and just to take into consider-

*716] ation the circumstance of the *difference of cost to the company, as, for instance, in the carriage of larger quantities at regular intervals, as compared with smaller and irregular consignments. There are many cases, as my Lord has suggested, where a comparatively lower charge may be justified for what is called through traffic,—from terminus to terminus,—than for a traffic to and between intermediate stations. In the present case, the only substantial ground on which it could for a moment be contended that there has not been an undue preference, is, that, in reference to some of the collieries, a threat has been held out to the company by a powerful individual, that, unless they will agree to carry the produce of those collieries for his tenants at a lower rate than they carry for others, he will divert a large portion of the traffic of the railway, by constructing another line over his own land. That clearly is not a sufficient ground to justify the company in thus varying their charges to the prejudice of the complainants.

WILLES, J.—I am entirely of the same opinion. The fact that the Messrs. Fletcher send their coals along different portions of the railway, and less distances than the complainants, is clearly not the foundation for the difference of charge. Such difference of charge does not represent any proportionate difference in the distances which the coals of each are carried along the line. The real ground upon which the company

seek to justify the imposition of a higher charge on the complainants than upon the Messrs. Fletcher, is, that the latter are tenants of Lord Lonsdale, and it is suggested that Lord Lonsdale may be induced to make a railway for the use of the tenants or lessees of his collieries, and so withdraw considerable traffic from the defendants' railway, unless they consent to reduce the tolls to his tenants so as to enable them to compete with the *complainants; in other words, to buy off a danger which might arise if Lord Lonsdale should be minded to make another railway.(a) That, as it appears to me, is entering upon a very wide field of speculation as to what may or may not happen, and far too remote to form the ground of a decision; for, the law looks only to matters that are proximate. I think it is far safer to confine ourselves to the state of things actually existing than to speculate upon what may or may not happen at some future time. If we indulge in speculation as to the results that might flow from the execution of Lord Lonsdale's threat, we may carry it to this extent, that, as Lord Lonsdale would possibly require the sanction of the legislature for the purpose, the complainants and the rest of the public might either by the provisions of the general act, 8 & 9 Vict. c. 20, or of the local act, acquire a right to have their coals carried on that railway upon the same terms as those of Lord Lonsdale's tenants are carried thereon. This demonstrates the absurdity of indulging in speculations of the kind suggested. The result is, that the company have, without any justifiable reason, imposed a higher scale of charges upon the complainants than upon the Messrs. Fletcher, which is a thing that falls clearly within the prohibition of the statute. For these reasons I think the rule must be made absolute. [*717

Rule absolute.

(a) The affidavits upon which cause was shown disclosed the fact that the Earl of Lowther is himself a large shareholder in the Cockermouth and Workington Railway Company.

*In re JONES and THE EASTERN COUNTIES RAILWAY COMPANY. *Jan.* 27. [*718

The court refused to grant a rule for an injunction against the Eastern Counties Railway Company, under the Railway Traffic Act, 1854, to compel them to issue season tickets between Colchester and London on the same terms as they issued them between Harwich and London,—upon a mere suggestion that the granting the latter (the distance being considerably greater) at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester.

PEARCE moved for a rule calling upon the Eastern Counties Railway Company to show cause why a writ of injunction should not issue against them pursuant to the Railway and Canal Traffic Act, 1854, enjoining them to grant to Henry Jones a season ticket to travel on their line from Colchester to London and back upon the same terms as they granted similar tickets to other persons from Harwich to London and back.

The affidavit upon which the motion was founded, stated,—that Colchester is distant from London upwards of fifty miles, and that the borough of Harwich, in the county of Essex, is distant from Colchester upwards of twenty miles, and from London upwards of seventy miles, and that there is a railway from London to Colchester called The Eastern

Counties Railway, belonging to or worked by the Eastern Counties Railway Company: that, from Colchester to Mannington in the said county is another railway, or portion of a railway, called The Eastern Union Railway, which said last-mentioned railway belongs to or is worked by and is under the management and control of the said Eastern Counties Railway Company: that, at Mannington aforesaid, there is another railway called the Harwich Railway, which also belongs or is worked by, and is under the management and control of the said Eastern Counties Railway Company: that the direct route from London to Harwich is through Colchester and Manningtree: that the price of a first class season ticket for travelling on the said Eastern Counties Railway from Colchester to London, is 45*l.* per year: that the Eastern Counties Railway
*719] Company grant to divers persons *first class season tickets for travelling from Harwich (or from the parish of Dovercourt, which is situate within the borough of Harwich), through Colchester, over and upon the said railways to London, for 20*l.* per annum, which the complainant submitted was an undue or unreasonable preference or advantage to or in favour of such persons as aforesaid, and unfair, illegal, unequal, oppressive, injurious, and unjust: and that the complainant had applied to the company for a first class season ticket to enable him to travel from Colchester to London (which is not so far from London as Harwich is by twenty miles) on the same terms, and at the same price, as the company grant such season tickets from Harwich to London, but which the company refused to grant.

Pearce submitted that the affidavit disclosed a clear breach of the prohibition contained in the 2d section of the 17 & 18 Vict. c. 31. [WILLIAMS, J.—For anything that appears on your affidavit, there may be very good reasons for making such difference in the price. WILLES, J.—To bring the case within the act, you must show,—as we held the other day in the case of Harris and The Cockermouth and Workington Railway Company, antè, p. 693,—that the journeys are substantially the same. WILLIAMS, J.—At this moment there is active competition at Reading between the Great Western and South Western Railways: the consequence is, that considerably less is charged for tickets from that place to London and vice versâ than for intermediate stations.] There is no such reason for the difference here; for, there is but one line to Harwich, and consequently no competition. [WILLES, J.—Who do you suggest is unduly preferred to Jones?] The undue preference complained of, is, the preference of the inhabitants of Harwich over those of Colchester.

*720] *WILLIAMS, J.(*a*)—I am of opinion that there is no ground for the application. The bare facts stated in the affidavit upon which it is founded clearly do not constitute a case of undue preference within the act.

WILLES, J., concurred. Rule refused.(*b*)

(*a*) Cockburn, C. J., and Crowder, J., being both holders of shares in the Eastern Counties Railway Company, declined to take part in the discussion. The Lord Chief Justice, on a subsequent occasion where the same difficulty occurred, stated that he should take care to remove it by disposing of his shares.

(*b*) The case of Hozier *v.* The Caledonian Railway Company, Scotch Sessions Cases, Vol. 17 (N. S.) p. 302, is very much in point. There, the complainant, who resided at Maudslie Castle, in the vicinity of the Motherwell station of the Caledonian Railway, stated in his petition that he had frequent occasion to travel upon that railway between the Motherwell station and

Edinburgh and Glasgow, the termini of the line; that the fares exacted from passengers travelling from Motherwell station to Edinburgh, being a distance of about forty-three miles and vice versâ, were 9*s.* 6*d.* by first-class carriage, and 6*s.* 4*d.* by second-class carriage,—by parliamentary train these fares being reduced to 6*s.* 4*d.* and 3*s.* 7*d.* respectively; that, from Motherwell to Glasgow, being a distance of about sixteen miles, the fares exacted, were, for the first-class 2*s.* 6*d.*, and for the second-class 1*s.* 10*d.*, and in the parliamentary train 1*s.* 10*d.* and 1*s.* respectively; that the fares exacted from passengers travelling from the intermediate stations were at the same rate in proportion to the distance as the fares between Motherwell and Edinburgh and Glasgow, while the fares exacted from passengers travelling along the whole line from Edinburgh to Glasgow, or vice versâ, were 2*s.* by first-class carriage, and 1*s.* by third-class carriage; that the rates above mentioned charged to the petitioner and his family and dependants for travelling on the Caledonian Railway between Edinburgh and Motherwell and Motherwell and Glasgow respectively, as compared with the rates charged to passengers travelling through between Edinburgh and Glasgow, amounted to an undue and *unreasonable preference to and in favour of such through passengers over the petitioner [*721 and others travelling between Motherwell and Edinburgh or Motherwell and Glasgow, or intermediate places, and the charging of such rates as were charged to the petitioner and his family and dependants as aforesaid was, in the circumstances, in violation and contravention of the provisions of the statute; and that the petitioner was aggrieved by being charged 9*s.* 6*d.* for travelling between Motherwell and Edinburgh,—a distance of 43 miles,—while passengers travelling in the same train, and the same class of carriage, between Glasgow and Edinburgh,—a distance of 59 miles,—paid only 2*s.* The court held that this was no violation of the statute. The Lord President M'Neil said: "I do not see that this petitioner has shown any interest at all. I put the question whether he suffered any disadvantage by the proportional rating complained of; and the answer was, that he did not complain of any disadvantage, but that he did not choose that parties travelling from Edinburgh to Glasgow should enjoy the benefit of a cheaper mode of travelling than he himself could enjoy. It does not appear to me to be a matter which the statute provides for at all. It provides for giving undue preferences to parties pari passu in the matter; but you must bring them into competition in order to give them an interest to complain. If two towns were situated on the line of railway, and the market-day of Edinburgh being Wednesday, if the railway company were to resolve to carry goods on Tuesday from the one burgh, and resolved not to carry goods at all from the other burgh till Thursday, for the same destination, that would be a competition of interest, and a well-founded ground for complaint under the statute at the instance of parties connected with the second station by residence or traffic, because in that case there would be an undue preference of one competing interest over another. But there is nothing of the sort here. No injury is done to the party complaining: and it is always to be regarded, in a matter of this kind, that a company reducing rates to all parties travelling along their line do so at their own risk, and they themselves are the parties who suffer." And Lord Curriehill said: "What is this complaint? The only case stated in the petition, is, that passengers passing from Glasgow to Edinburgh, or from Edinburgh to Glasgow, are carried at a cheaper rate than *passengers from Mid Calder to either of these places. Now, that is an advantage, no [*722 doubt, to those passengers travelling between Edinburgh and Glasgow. But, is it an unfair advantage over other passengers travelling between intermediate stations? The complainer must satisfy us that there is something unfair or unreasonable in what he complains of, in order to warrant any interference. Now, I have read the statement in the petition, and I have listened to the argument in support of it, to find what is unreasonable in giving that advantage to through passengers. What disadvantage do Mid Calder passengers suffer by this? I think that no answer was given to this, except that there was none."

JOHN BRYANT, by ELLEN BRYANT, his next Friend, *v.* WILSON. *Feb.* 1.

In an action by an infant, the writ was sued out *in person*, and, one E. B. being appointed next friend: a copy of the order for that purpose was served on the defendant's attorney, endorsed "E. B., next friend, at S. N. C.'s, No. 8, Symond's Inn, Chancery Lane;" and a declaration was afterwards delivered with a notice to plead similarly signed. The plaintiff having obtained a verdict,—Held, that the above was a sufficient notice to the defendant that S. N. C. was authorized by the next friend to act as attorney; and, the master having on taxation allowed only costs out of pocket, the court refused to set aside an order directing him to review his taxation.

THIS was an action for negligently driving against and injuring the plaintiff. On the 8th of October, 1857, the plaintiff, who was an infant, sued out a writ of summons against the defendant, endorsed as follows, —"This writ was issued in person by John Bryant, who resides at No. 1, Crown Court, in the parish of Cripplegate, in the city of London, plaintiff in person within named." On the 24th, an order was obtained appointing Ellen Bryant the next friend of the plaintiff to prosecute the action on his behalf; and a copy of the order was served upon the defendant's attorney, endorsed with the following address, "Ellen Bryant, next friend, at S. N. Cooper's, 8, Symond's Inn, Chancery Lane," as required by the 166th rule of Hilary Term, *1853.(a) On the 26th, a declaration was delivered to the defendant's attorney, with a notice to plead endorsed thereon, signed by Ellen Bryant, who gave her address "at S. N. Cooper's, 8, Symond's Inn, Chancery Lane." The issue was delivered on the 16th of November, endorsed with a notice of trial similarly signed. The cause was tried at the sittings after last Michaelmas Term, when a verdict was found for the plaintiff, with 20*l.* damages. On the 16th of January, 1858, Cooper delivered a bill of costs amounting to 96*l.*, with an appointment to tax for the 18th.

*723]

Upon attending the taxation, the defendant's attorney objected to the bill being taxed upon the same principle as an ordinary attorney's bill, inasmuch as no notice had been given that an attorney had been appointed by the next friend, but, on the contrary, all the notices which were served upon the defendant's attorney bore the signature of Ellen Bryant as next friend of the plaintiff. The master, being of opinion that there was nothing to distinguish this action from one which had been conducted by the plaintiff in person, declined to allow anything more than costs out of pocket. An order having been made by Byles, J., at Chambers, for a review of the taxation,

Hawkins moved for a rule to show cause why the order should not be set aside.—The master was clearly right in refusing to allow the costs, the plaintiff appearing in person, and no attorney having been appointed by the guardian. The 166th rule of Hilary, 1853, provides, that, "in all cases where a party sues or defends in person, he shall, upon issuing any writ of summons, or other proceeding, or entering an appearance, enter in a book to be kept for that purpose at the Masters' *Office an address, within three miles from the General Post-Office, at which all pleadings, notices, summonses, orders, rules, or other proceedings, not requiring personal service, shall be left; and, if such address shall not be entered in the said book, or if such address shall be more than three miles from the General Post-Office, then the opposite party shall be at liberty to proceed by sticking up all pleadings, notices, summonses, orders, rules, or other proceedings, in the Masters' Office, without the necessity of any further service." To entitle the plaintiff to costs in the ordinary way, the proceedings should purport to have come from the attorney. Here, they purport to come from the next friend of the plaintiff. [COCKBURN, C. J.—The name and address of an attorney are given,—"S. N. Cooper, No. 8, Symond's Inn, Chancery Lane." What more could the next friend do?] Giving the address at No. 8,

*724]

(a) See 13 C. B. 38 (E. C. L. R. vol. 76).

Symond's Inn, was merely in compliance with the 166th rule. That is not enough. The 167th rule provides, that, "in all cases where a plaintiff shall have sued out a writ in person, or a defendant shall have appeared in person, and either party shall by an attorney of the court have given notice in writing to the opposite party, or the attorney or agent of such party, of such attorney being authorized to act as attorney for the party on whose behalf such notice is given, all pleadings, notices, summonses, orders, rules, and other proceedings which according to the practice of the courts, are to be delivered to or served upon the party on whose behalf such notice is given, shall thereafter be delivered to or served upon such attorney." [COCKBURN, C. J.—That rule is in favour of the party appearing by attorney, not for the other side. Is there any authority upon the subject?] None is found: but the officers of the court are unanimously of opinion, that, under the circumstances here disclosed, the plaintiff was not entitled to the costs of suing by attorney. *[COCKBURN, C. J.—You do not suggest that you have sustained any grievance.] No. [*725

Griffits, who appeared to show cause in the first instance, was stopped by the court.

COCKBURN, C. J.—We are all clearly of opinion that the plaintiff ought to have his costs. There will therefore be no rule.

Rule refused.

WILLIAM TALBOT AGAR and LOUISA AGAR *v.* The Official Manager of THE ATHENÆUM LIFE ASSURANCE SOCIETY. *Jan.* 26.

A departure from the formalities required by the deed of settlement of a joint stock company does not affect the validity of a contract under its common seal.

It is no defence, therefore, to an action against a joint stock company upon a debenture sealed with their common seal, that the borrowing of the money thereby secured was not sanctioned by a resolution of an extraordinary general meeting of the shareholders, pursuant to the provisions of their deed of settlement.

By the 12th clause of the deed of settlement of a joint stock company, it was provided that it should be competent for any extraordinary general meeting, and no other, by a majority of at least two-thirds of the shareholders, by any resolution to increase the capital stock of the company by creating new shares, and also to empower the directors to borrow money on mortgage or on such other securities as to the meeting might seem fit. The 27th clause provided that it should be lawful for the directors to effect insurances on lives and survivorships, to sell out and purchase reversions and annuities, and to grant endowments for children, and generally to effect all such other insurances, whether life, guardian, guarantee, or otherwise, upon such terms and conditions and in such manner as the directors should think proper. The 28th provided that any policy, endowment, grant of annuity, *or other instrument* required in any of the transactions aforesaid, should be given under the hands of not less than *three* of the directors, and sealed with the common seal of the society. And the 35th provided that the directors should have power, with the consent of an extraordinary general meeting in the manner thereinbefore provided, to borrow, on mortgage or otherwise, such moneys as they should think expedient:—Held, that the 28th clause applied only to instruments and transactions ejusdem generis with those mentioned in the 27th, and not to debentures.

And *semble*,—per Williams, *J.*,—that a joint stock company cannot by its deed of settlement declare that deeds given by them,—which, under the 44th and 46th sections of the 7 & 8 Vict. c. 110, are valid if signed by *two* of the directors,—shall not be valid unless signed by *three*.

THIS action was brought to recover the sum of 860*l.*, being the interest claimed to be due from The Athenæum Life Assurance Society

*726] to the plaintiffs upon *eight several debentures alleged to have been granted by the company to Louisa Agar the elder, Louisa Agar the younger, and William Talbot Agar, in manner hereinafter mentioned. Louisa Agar the elder died on the 8th of April, 1855, leaving the plaintiffs her surviving.

The Athenæum Life Assurance Society obtained a certificate of complete registration under the 7 & 8 Vict. c. 110, on the 14th of May, 1851.

On the 17th of July, 1854, the plaintiff William Talbot Agar, on behalf of himself, Louisa Agar the elder, and Louisa Agar the younger, duly paid the sum of 4000*l.* to Messrs. Hopkinson & Co., the bankers of the said Athenæum Life Assurance Society, to the account of the said society, and the same was then carried over to their credit in the books of the said bankers.

The plaintiffs then received eight several debentures of 500*l.* each from the office of the said society, to secure the repayment of the said money so advanced as aforesaid. These debentures bore date on the 17th of July, 1854, and were in the following form:—

"Athenæum Life Assurance Society.

"Debenture No. 14. Amount, 500*l.*

"By virtue of the deed of settlement of the Athenæum Life Assurance Society, bearing date the 2d of May, 1851, and registered pursuant to the acts for the registration, incorporation, and regulation of joint stock companies, and by the direction and consent of more than two-thirds of the shareholders of the said company present at a meeting convened for the purpose, the said society, in consideration of 500*l.* advanced to them for the purposes of the society by Louisa Agar the elder, widow, Louisa Agar the younger, spinster, and William Talbot Agar, Esq., of, &c., do hereby covenant with the said Louisa Agar the elder, Louisa Agar the younger, and W. T. Agar, their executors, administrators, and assigns, to repay the same to him or them, or as he or they shall *727] direct, on the 17th of July, 1859, with *interest thereon in the mean time at the rate of 6*l.* per cent. per annum, to be computed from the 17th of July, 1854, and payable half-yearly, on the 1st of January and 1st of July in each year, so long as the said sum of 500*l.* shall remain unpaid to the said Louisa Agar the elder, Louisa Agar the younger, and W. T. Agar, their executors, &c., by the said society, the first payment of such interest to be made on the 1st of January next: but, if at any time before the expiration of the period above mentioned any portion of the said sum of 500*l.* shall be repaid, then such interest shall be payable only on the portion remaining unpaid; and the covenant on the part of the said society to pay such interest is nevertheless only on condition that the stipulations following be complied with,—

"1st. The holder of this debenture is in all cases, when required by the manager, to produce the same to him for inspection:

"2d. This debenture to be delivered up to the society on payment of the principal.

"Given under the common seal of the society, this 17th July, 1854.

"J. BARTLETT, Chairman. [Common L. S. Seal.]

"H. SUTTON, Manager.

"The seal was affixed in the presence of

"F. G. TOMLINS, Secretary.

The said debentures were sealed with the common seal of the said Athenæum Life Assurance Society, and signed by Josiah Bartlett and Henry Sutton, as they purport to have been. At the time of the signing and sealing of the said debentures, Josiah Bartlett and Henry Sutton were directors of the said Athenæum Life Assurance Society, and F. G. Tomlins was the secretary of the said Athenæum Life Assurance Society.

There is the following entry of a resolution of the directors, in the directors' agenda-book, under date the 14th of July, 1854,—"Resolved, that the company's *seal be affixed to eight several debentures for 500*l.* each in favour of Louisa Agar the elder, widow, Louisa Agar, jun., spinster, and W. T. Agar." [*728

The last-mentioned resolution or entry is signed by A. B. Richmond, Henry Harris, J. Bartlett, and Henry Sutton as manager. The said A. B. Richmond, Henry Harris, J. Bartlett, and Henry Sutton, at the date of the said entry, were directors, and the said Henry Sutton was manager of the said Athenæum Life Assurance Society. The said moneys were advanced by the plaintiffs to the said Athenæum Life Assurance Society in good faith, and without any knowledge of any irregularity in the holding of the meeting in the said debentures mentioned; and the plaintiffs were wholly ignorant that the said directors of the said Athenæum Life Assurance Society, in receiving the said money for the said society, or in issuing the said debentures, were guilty of any irregularity, or that they the said directors in any manner exceeded their power or authority as such directors, if in fact they were guilty of any irregularity or did exceed their powers in any manner whatsoever.

The said Athenæum Life Assurance Society, on the 5th of January, 1855, paid half a year's interest to the 1st of January, 1855, on the said debentures, by a check signed by Josiah Bartlett, Joseph James Reed, and Henry Sutton, directors of the said company.

The said Athenæum Life Assurance Society paid the interest on the said debentures to the 1st of July, 1855.

On the 22d of February, 1856, the said Athenæum Life Assurance Society paid 10*l.* on account of the interest due to the 1st of January, 1856; and, subsequently, on the 4th of April, 1856, they paid to the plaintiffs 110*l.*, being the balance due to them for interest on the said debentures on the 1st of January, 1856, by check, dated the 2d of April, 1856, signed by D. Birch and A. B. Richmond, then being directors of the said society.

*Except as aforesaid, neither the plaintiffs nor the said Louisa Agar the elder in her lifetime have received any part of the said sum of 4000*l.*, or the interest thereon, but the same remains due and owing to the plaintiffs. [*729

The plaintiffs and the said Louisa Agar the elder have at all times been ready and willing to comply with all the conditions of the insurance.

An order absolute for the dissolution and winding up of the Athenæum Life Assurance Society was made by Vice-Chancellor Wood, in pursuance of the Winding-up Acts, 1848 and 1849, on the 12th of July, 1856.

The plaintiffs contend, that, upon these facts, they are entitled to recover from the said Athenæum Life Assurance Society the interest due upon the said debentures; and that the said society is estopped from

alleging that the moneys were not advanced, and that the covenants in the said debentures contained were not entered into, in pursuance of the powers contained in the said deed of settlement of the said society, and by the direction and consent of more than two-thirds of the shareholders of the said society present at a meeting convened for that purpose.

If, however, the defendants are at liberty to go into evidence that the said debentures were not issued in pursuance of the powers given to the directors by the said deed of settlement, they rely upon the following facts as showing that the said debentures, and the covenants therein contained, were not binding upon them:—

These facts are admitted to be true:—That the deed of settlement contains, amongst others, the following clauses,—

7. "That, in case at any general meeting, ordinary or extraordinary, fifty shareholders, holding together 500 shares, shall not be present and proceed to business within one hour after the time fixed for the meeting,
*730] *no business shall be done, but the meeting, if convened only on special requisition, shall stand absolutely dissolved, but, in every other case, shall stand adjourned to that day week at the same hour and place, and so on from week to week, from day to day, or hour to hour, as often as the same shall happen, until at some such meeting the required number of shareholders, holding such shares as aforesaid, shall be present and proceed to business within one hour from the time fixed for such meeting: but any such meeting as last aforesaid shall not afterwards be rendered incompetent to transact business by reason of the departure of any shareholder or shareholders after the chair shall have been taken.

9. "That not less than seven, nor more than fourteen days' notice of the time and place of holding any general meeting, ordinary or extraordinary, and of every adjournment thereof for more than seven days, and also (except in the cases of the election of directors, auditors, trustees, or other officers of the society, or of the consideration of the accounts, balance-sheets, or ordinary reports of the directors or auditors by any ordinary meeting) of the business to be transacted thereat, shall be given by letter addressed to every shareholder, and also by advertisement in some London newspaper: but the non-receipt of such notice by any shareholder shall not invalidate the proceedings of any general meeting.

11. "That (except in the cases before specified), and except as hereinafter is provided, no other business shall be transacted at any general meeting than that for which it shall have been called and of which notice shall have been given as aforesaid; and that it shall be competent for any general meeting, ordinary or extraordinary, and such meeting is hereby empowered, to elect to the office of director, auditor, or trustee, by a majority of votes of the shareholders then present, either personally or by proxy, and also, for negligence, misconduct, or incompetence, or any
*731] other cause which in *the judgment of two-thirds of the shareholders duly qualified to vote, and who shall be present either personally or by proxy at such meeting, shall appear sufficient, by any resolution with which two-thirds of such shareholders shall concur, to remove from office (immediately or prospectively) any director, manager, auditor, trustee, actuary, secretary, solicitor, or other officer or servant of the society whatsoever; and that such removal shall be binding and conclusive as against the person or persons so removed, who shall not have or be

entitled to any remedy, action, or suit against the society, or any officer thereof, at law or in equity, by reason of the same or of any matter arising therefrom; and also, by resolution of the majority of votes of the shareholders then present as aforesaid, to vary the number of such directors, auditors, trustees, officers, or servants, and for that purpose to determine, either immediately or prospectively, the office of such number of directors or other officers as may be expedient, or to create new or additional officers, and make the requisite changes in the rotation of their officers, and to receive, examine, and pass or reject the accounts, balance-sheets, and reports of the directors, auditors, and (if any) of the actuary, to compel the production of any book, paper, deed, or document belonging to the society, and, generally, to control the board of directors, to authorize any act for which the sanction of a general meeting is hereby made requisite, and to discuss, and, subject to the following clause and the provisions of these presents, to determine upon any question, matter, or thing relating to the affairs of the society which shall arise in the course of the conduct or management thereof, and shall be brought before such meeting by any shareholder whatsoever: Provided that every shareholder shall be at liberty to submit to a general meeting any motion not relating to the business for which such general meeting shall have been convened, upon *giving fourteen days' previous notice in writing of such motion to the manager, and also, if such motion should relate to the removal of any director, manager, auditor, trustee, or other officer or servant of the society, upon sending a written notice of such motion to every shareholder, seven days at least before the day appointed for holding such meeting. [*732

12. "That it shall be competent for any extraordinary general meeting, and no other, and such meeting, and no other, is hereby empowered, by a majority which shall consist of at least two-thirds in number of the shareholders of the society for the time being, or of the holders of policies of the society for life and for not less than 500*l.*, each on the participating scale (and on which two annual premiums at the least shall have been then paid), and also of two-thirds in number of the shareholders and the said qualified holders of policies present personally or by proxy at the meeting, and which shareholders shall hold together at least two-thirds of the shares in the said capital stock of the society which for the time being may have been subscribed for, by any resolution or resolutions to increase at any one time, or from time to time, the capital stock of the society, and for that purpose to create a sufficient number of new or additional shares of the same amount per share as the said present shares of 1*l.* each, as to such meeting shall seem fit; provided that such addition or additions to the capital of the society do not exceed in the whole the sum of 990,000*l.*, and to make all other changes and do all other acts consequent thereon or incidental or necessary thereto; and also to empower and require the directors to borrow and take up on mortgage of the said estate or chattels real belonging to the society, or on such other securities as to such meeting may seem fit, any sum or sums of money which such meeting shall deem expedient, and which the directors for the time being are not authorized to raise *under the power in that behalf hereinafter contained, not exceeding in the whole the sum of 50,000*l.*: Provided always that no general meeting, ordinary or extraordinary, shall have power so to affect or alter the rateable [*733

division of the profits and liability to the losses of the society, as between the shareholders, as to render the shareholders entitled to such profits or liable to such losses otherwise than in proportion to the amount and number of the respective shares held or suubscribed for by them in the capital stock of the society, or to affect or alter the provisions hereof for the indemnity of the officers or the dissolution of the society.

20. "That a common seal shall be provided for the society, bearing such device as the directors shall think proper; but the name of the society shall be inscribed thereon; and the directors shall have power to break and alter the same, and to provide another seal in place thereof: and such seal shall be kept in some secure place selected by the directors: and such common seal shall not be affixed to any policies or other documents of the society, except by the order of *three* directors, signed by them, and countersigned by the manager, or, in his absence, by such officer as the directors shall appoint.

The 27th clause provided that it should be lawful for the directors of the said society to effect insurances on lives and survivorships, to sell out and purchase reversions and annuities, and to grant endowments for children, and generally to effect all such other insurances, whether life, guardian, guarantee, or otherwise, upon such terms and conditions, and in such manner, as the directors should think proper.

28. "That every policy, endowment, grant of annuity, or other instrument required in any of the transactions aforesaid, shall be given under the hands of not less than *three* of the directors, and be sealed *734] with the common seal of the society; and that there *shall be contained therein, and in every other contract to be entered into on behalf of the society in or about the premises, a reference to these presents, and a proviso limiting the scope and effect of the contract thereby created, so that the same shall take effect and be satisfied only out of such funds and property of the society as under the provisions hereinafter contained shall at the time at which such liability shall accrue be at the disposal of the directors in that behalf, and negativing an unconditional liability: Provided always, that nothing herein or in such contract contained shall limit the liability of any shareholder as to the performance of such contract, or prejudice the rights of any person or persons against any shareholder under or by virtue of the aforesaid statute.

35. "That the directors shall also have full power and authority on behalf of the society to receive and (with the consent of an extraordinary general meeting in the manner hereinbefore provided) to borrow on mortgage or otherwise, and also (at their own absolute discretion), and in the usual and ordinary course of the business of the society, to invest, lay out, or advance at interest, on government securities, or on such personal or other security as they shall think fit and advantageous and they lawfully may, such moneys, or such parts of the moneys and funds of the said society as they shall think expedient."

The following entry appears in a book used by the promoters of the company prior to its formation, viz.

"At an extraordinary general meeting of the shareholders of the Athenæum Life Assurance Society, held at the company's office on the 16th day of May, 1851,

"The Rev. J. Bartlett in the chair.

"Resolved, 1. That the capital stock of this company be increased from 10,000*l.* to 100,000*l.*

"Resolved, 2. That 1400 shares be awarded to the original promoters of the society.

*"Resolved, 3. That the appointment of Henry Sutton, Esq., as manager, and John Carrington Jones, Esq., as secretary to the company, be confirmed as settled by the board of directors on the 19th day of April, 1851. [*735

"Resolved, 4. That the directors be hereby empowered to borrow any sum or sums of money not exceeding in amount the present increased capital of the company, on debenture under the common seal, or on such other security as to such directors shall seem fit.

"Resolved, 5. That a vote of thanks be given to the Rev. J. Bartlett, for his conduct in the chair.

"J. BARTLETT, chairman."

The said entry is in the handwriting of, and signed by, Mr. Bartlett.

There is no entry of such meeting, or of any other meeting authorizing the borrowing of money, in the registry-book of the general meetings of the shareholders, or in any other book; and it is alleged by the defendants that no meeting at which any authority was given to the directors to borrow money was in fact held: and, in support of that contention, they rely on the statement of Mr. William Shambrook Whitehead, who states as follows,—"That he was the principal cashier, and a shareholder of the company, from the time of the formation of the company, and so continued until its dissolution; and that he was in the habit of attending the general meetings of the company; and that, to his belief, during that period, no meeting of shareholders was held at which any authority was given to the directors to borrow money on debentures or otherwise; and that, to his belief, no meeting of the shareholders was held on the 16th of May, 1851."

The following persons appear to have executed the deed of settlement of The Athenæum Life Assurance Society previously to the 16th day of May, 1851, at the dates, and for the number of shares, set opposite to their respective names, viz.

Christian and surname.	Occupation, rank, or usual title.	Address.	Number of shares.	Signature.	Seal.	Date of signature.	Attesting witness.
Henry Sutton . . .		30, Sackville Street .	100			May 2, 1851.	
Edward Curteis . .		Ealing, Middlesex .	100			"	
James Charles Johns		Alfred Pl., Thurlow Sq.	100			"	
John Baldwin Buckstone		6, Brompton Square .	100			"	
Henry Harris . . .		35, Howland Street .	100			"	
H. and A. M. Sutton .		30, Sackville Street .	200			"	
H. and C. H. Sutton .		30, Sackville Street .	100			"	
H. and C. H. Sutton .		30, Sackville Street .	100			"	
James Ashplant . .		Angel Terrace . . .	200			"	
John Wright Shaw .		27, Upper Winchester Street	5			"	
J. Carrington Jones .		Fulham	50			"	
Charles Woodward .		Prince's Square . .	10			"	
John Robert Wylde .		Walton-on-Thames .	50			"	
M. Spence Baylis . .		10, Park Crescent . .	5			"	
Octavius J. Crossley .		Grove, Camberwell .	5			"	
Mary J. Curteis . .		De Beauvoir Road .	10			"	
Samuel Curteis . .		De Beauvoir Road .	20			"	
Elizabeth Batt . . .		Ealing, Middlesex .	5			"	
Susan Curteis . . .		De Beauvoir Road .	5			"	
W. Shambrook Whitehead		67, Cheapside . . .	20			"	
John Jones		31, Arlington Street .	20			"	
Joseph Kaye . . .		15, Pelham Crescent .	50			"	
Edward Moseley . .		75, Coleman Street .	50			"	
William Curteis . .		1, George Yard . .	20			"	
James Gage Stirton .		Chislehurst	300			May 5, 1851.	
Edward Curteis . .		Ealing, Middlesex .	200			"	
Josiah Bartlett . . .		Hatcham, Surrey .	200			May 9, 1851.	
John Rees Croker . .		Chatham, Kent . .	400			May 10, 1851.	
Henry Harris . . .		35, Howland Street .	500			May 13, 1851.	

*737] *The above shareholders, on the said 16th of May, held 3025 shares in the said company.

The first policy granted by the said society bears date the 8th of July, 1851, and was effected by John Syer Bristowe, junior, for the sum of 1000*l.*

The said William Shambrook Whitehead, James Ashplant, John Rees Croker, and John Baldwin Buckstone did not attend the said alleged meeting, nor was any notice of the said alleged meeting given to them. It is not known, and has not been ascertained, that notice of the said meeting was ever advertised in any London newspaper, although the following newspapers have been searched from the 1st to the 9th of May, 1851, viz. The Times, The Daily News, The Morning Advertiser, The Morning Post, The Morning Chronicle, The Morning Herald, The Sun, The Globe, The Standard, The Weekly Dispatch, The Era, The Observer, Lloyd's Weekly Newspaper, The Weekly Times, The Sunday Times, being the principal daily morning and evening papers and the weekly papers published in May, 1851; and no advertisement or notice of any kind whatever relating to The Athenæum Life Assurance Company can be found in any of the aforesaid papers between the said 1st and 9th of May, 1851.

The defendants contend, that, from the facts above stated, it must be

taken that the plaintiffs had constructive notice of the circumstances stated in the case with reference to the authority of the directors to borrow money: and the court was to be at liberty to draw any inference of fact which a jury might have done.

A copy of the deed of the society was to form part of the case.

The questions for the opinion of the court, were,—First, whether the said Athenæum Life Assurance Society were not estopped by the recitals of the said debentures from denying that the money was in fact *borrowed, and the covenants entered into, by virtue and in pur- [*738 suance of the powers contained in the deed of settlement of the said society, and by the direction and consent of more than two-thirds of the shareholders of the said company present at a meeting convened for that purpose,—Secondly, whether, subject as aforesaid, the facts in evidence constituted any defence to the action.

If the court was of opinion, that, under the circumstances, the plaintiffs were entitled to recover, judgment was to be entered for the plaintiffs, with costs of suit. If not, judgment was to be entered for the defendants, with costs of suit.

Bovill, Q. C. (with whom was *Norman*), for the plaintiffs.(*a*)—The plaintiffs rely upon an instrument under the common seal of the company, and signed by two *directors. It is submitted that that [*739 is sufficient under the statute, and that the defendants are estopped from denying that that instrument was duly issued by virtue of their deed of settlement, and by the direction and consent of more than two-thirds of the shareholders present at a meeting convened for the purpose. These provisions are directory only, and immaterial as regards the public and persons dealing with the company. By the 7 & 8 Vict. c. 110, s. 7, before obtaining a certificate of complete registration, there must be a deed of settlement, in the form prescribed in Schedule A., which is to contain, amongst other things, a provision "for insuring the safe custody of the seal of the company, and for regulating the authority under which it is to be used." That has been complied with here;

(*a*) The points marked for argument on the part of the plaintiffs, were,—

"That the society is estopped from alleging that the debentures on which the action is brought were not duly issued by virtue of the deed of settlement of the society, and by the direction and consent of more than two-thirds of the shareholders of the company present at a meeting convened for the purpose.

"That the court cannot infer as a fact from the circumstances stated in the special case that such meeting was not held.

"That, whether such meeting was held or not, inasmuch as the plaintiffs advanced the money in good faith, and without notice that such meeting had not been held, and inasmuch as the money was in fact actually paid to and received by the society, any irregularity in the holding of the supposed meeting cannot be set up as an answer to the claim of the plaintiffs in this action.

"That the clauses of the deed relied upon by the defendants may be binding on the directors and shareholders of the company; so that, if the directors have acted in excess of the powers therein conferred upon them, such excess of authority may have been a breach of trust on the part of the directors, but cannot affect the rights of persons dealing with the company in ignorance of such breach of trust.

"That the deed gives powers to the directors and to general meetings to borrow money and to grant annuities other than such powers as are given by the 12th clause of the deed.

"That the several clauses of the deed relied on by the defendants are either simply directory or empowering, and not restraining clauses.

"That the plaintiffs are not bound to inquire into the regularity of the issuing of the said debentures, and whether the said loan and debentures had been authorized or not by the said directors or by the society."

for, the 20th clause of the deed of settlement directs "that a common seal shall be provided for the said society, and such common seal shall not be affixed to any policies or other documents of the said society except by the order of three directors, signed by them, and countersigned by the manager:" and the case finds that there *was* such an order. The 44th and 46th sections of the act contain provisions for the regulations of contracts by joint stock companies. The 44th section, "for the purpose of regulating contracts entered into on behalf of any joint stock company completely registered under this act (except contracts *740] for the purchase of any article the payment *or consideration for which doth not exceed the sum of 50*l.*, or for any service the period of which doth not exceed six months and the consideration for which doth not exceed 50*l.*, and except bills of exchange and promissory notes)," enacts "that every such contract shall be in writing, and signed by *two at least* of the directors of the company on whose behalf the same shall be entered into, and shall be sealed with the common seal thereof, or signed by some officer of the company on its behalf, to be thereunto expressly authorized by some minute or resolution of the board of directors applying to the particular case; and that, in the absence of such requisites, or of any of them, any such contract shall be void and ineffectual (except as against the company on whose behalf the same shall have been made); and that every such contract for the purchase of any article the consideration of which doth not exceed the sum of 50*l.*, or for any services the period of which doth not exceed six months and the consideration for which doth not exceed 50*l.*, entered into on behalf of any joint stock company completely registered under this act, may be entered into by any officer authorized by a general by-law in that behalf; and that every such contract, whether under seal or not, shall immediately after the same shall have been entered into be reported to the secretary or other appointed officer of the company on whose behalf the same shall have been entered into, who shall enter the same in proper books to be kept for that purpose; and that, if any such contract be not so reported and entered, then the officer by whose default such contract shall not be so reported or entered, shall be liable to repay to the company on whose behalf such contract may be made, the amount of the consideration to be paid by or on behalf of such company in respect of such contract." That section has been complied with here. The 45th *741] *section applies to bills and notes by the company. And s. 46 enacts "that all deeds and instruments bearing the seal of the company shall be signed by *two* at the least of the directors of the company." The 28th clause of the deed of settlement in this case provides "that any policy, endowment, grant of annuity, *or other instrument*, required *in any of the transactions aforesaid*, shall be given under the hands of not less than *three* of the directors, and sealed with the common seal of the society," &c. Now, if the *statute* had required the signatures of *three* directors, the omission to comply with that direction would not have rendered the transaction void: Cole *v.* Green, 6 M. & G. 872 (E. C. L. R. vol. 46), 7 Scott N. R. 682. The doctrine laid down by Lord Wensleydale, in Ernest *v.* Nicholls, 6 House of Lords Cases 401, 419, which will probably be relied on by the other side, has been much discussed, and is not quite in accordance with the doctrine of this court in Smith *v.* The Hull Glass Company, 11 C. B. 897 (E. C.

L. R. vol. 73). Under the 91st section of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), the determination as to the remuneration of the secretary of a company is to be exercised only at a general meeting; but, in Bill *v.* The Darenth Valley Railway Company, 1 Hurlst. & N. 305,† it was held that it is no answer to an action by a secretary for his salary, that no determination as to such salary had ever been exercised at any general meeting of the company. "These acts of parliament," says Bramwell, B., "are construed as if they were partnership deeds. To violate them may be a breach of trust as between the directors and the shareholders; but acts not done according to them may bind the company. If the directors, without such authority, have agreed to give the plaintiff 500*l.* a year, they may be guilty of a breach of trust, but that is all." The next question is, whether the defendants are not estopped from saying that there was no such meeting [*742 *duly held according to the statute and the deed of settlement. This point, it is submitted, is settled by the case of The Royal British Bank *v.* Turquand, 5 Ellis & B. 248 (E. C. L. R. vol. 85), affirmed on error, 6 Ellis & B. 327 (E. C. L. R. vol. 88). There, the plaintiffs declared against the defendants, a joint stock company completely registered under the 7 & 8 Vict. c. 110, on a bond, signed by *two* directors, under the seal of the company, whereby the company acknowledged themselves to be bound to the plaintiff in 2000*l.* The plea set out the condition, which appeared to be for securing to the plaintiffs, who were bankers, such sum as the company should, to the amount of 1000*l.*, owe to the plaintiff on the balance of the account current, from time to time, and for indemnifying the plaintiff to that amount from losses incurred by reason of the account between the plaintiff and the defendant: the plea further set out clauses of the registered deed of settlement, by which it appeared that the directors were authorized, under certain circumstances, to give bills, notes, bonds, or mortgages; and one clause provided that the directors might borrow on bond such sums as should from time to time, by a general resolution of the company, be authorized to be borrowed: the plea then averred that there had been no such resolution authorizing the making of the bond. The replication set out the deed of settlement further, by which it appeared that the company was formed for the purpose of carrying on mining operations and forming a railway: it also set out a general resolution, which, as suggested, authorized the making of the bond. On demurrers to the plea and replication, the Court of Queen's Bench held, that the plaintiff was entitled to judgment, the defendants admitting on the record that the bond was the deed of the company, and no illegality appearing,—the opening such an account with a bank being presumably within the authority of *the directors and for the benefit of the company,—and it not [*743 being shown that the obligee knew of any excess of authority, if there was any, or of any prejudice done to the shareholders, and no such prejudice being shown in fact: and this whether or not the resolution set out in the replication authorized the making of the bond. Lord Campbell, in delivering the judgment of the court below, says: "A mere excess of authority by the directors, we think, of itself would not amount to a defence. The bond being under the seal of the company, the gist of the defence must be illegality. If the directors had exceeded their authority, to the prejudice of the shareholders, by executing the

bond, and this had been known to the obligees, illegality, we think, would have been shown. The obligors in executing, and the obligees in accepting, the bond, might be considered as combining together to injure the shareholders: the two parties would have been in pari delicto; and the action could not have been maintained. In such circumstances, potior est conditio defendentis. But, without the scienter, and without prejudice to the shareholders or any others whatsoever, illegality is not established against the obligees. If no illegality is shown as against the party with whom the directors contract under the seal of the company, excess of authority is a matter only between the directors and the shareholders. No decision or dictum was cited on the part of the defendants for the avoidance of such a bond under such circumstances. But the case of Hill *v.* The Manchester and Salford Water Works Company, 2 B. & Ad. 544 (E. C. L. R. vol. 22), is an instance of such a bond being upheld, the plea not disclosing any fraud or injury done to the shareholders of the company; and the case of Horton *v.* The Westminster Improvement Commissioners, 7 Exch. 780,† was decided on the same principle." And in affirming the judgment the court of error say:

*744] "Parties dealing with *the directors of these joint stock companies are bound to read the deed or statute limiting the directors' authority, but they are not bound to do more. The plaintiffs, therefore, assuming them to have read this deed, would have found, not a prohibition to borrow, but a permission to borrow on certain things being done. They have, in my opinion, a right to infer that the company which put forward their directors to issue a bond of this sort, have had such a meeting and such a resolution passed as were requisite to authorize the directors in so doing:" 25 Law J., Q. B. 318. [COCKBURN, C. J.—The question here is, whether the plaintiff is at liberty to *infer* anything, when it is *found as a fact* that the directors had *not* authority to borrow.] It is submitted that there was a sufficient execution of these debentures under the seal of the company; that the signature of two directors, as required by the statute, was sufficient; and that the clause of the deed of settlement requiring an execution by *three* is directory only; and that the defendants are estopped from saying that there was no meeting, and no resolution authorizing the borrowing of money on debentures. This very question (amongst others) is now pending in the Court of Queen's Bench, in a case of The Prince of Wales Assurance Society *v.* The Athenæum Assurance Society, and the court have taken time to consider it.

*745] *Sir F. Thesiger*, Q. C. (with whom was *Field*), contrà.(*a*)—*The argument on the other side assumes that the directors may utterly disregard the provisions of the act of parliament and of the deed

(*a*) The points marked for argument on the part of the defendants, were,—

"1. That the debentures were made for money borrowed by the directors without the proper authority of the shareholders.

"2. That no meeting was held at which the directors were authorised to borrow the said money, as required by the provisions of the deed of settlement.

"3. That no proper notice prior to such meeting was given.

"4. That there were not the requisite number of shareholders present to give any such authority.

"5. That the debentures were not executed by three directors of the said company, as required by the said deed of settlement.

"6. That the defendant is not estopped from relying upon the objections aforesaid.

"7. That the said company are not liable upon the said debentures."

of settlement, and yet bind the shareholders. The case of The Prince of Wales Assurance Society *v.* The Athenæum Assurance Society differs essentially from this: there, the policy was signed by *three* directors, but was not made in pursuance of an order of three directors and countersigned as required by the 20th clause; and the question was, whether the policy was void on that account.(*a*) It appears by the special case that this company was completely registered on the 14th of May, 1851. Until registration, it could have no power to carry on business: 7 & 8 Vict. c. 110, ss. 7, 25: and then it could do so only subject to the provisions of the act and of the deed of settlement,—one of the powers mentioned in s. 25, being, "to borrow or raise money within the limitations prescribed by any special authority." All who contract with joint stock companies are bound to look to the act of parliament and the provisions of the deed. Now, what are the provisions relied on here as an answer to the liability which the plaintiffs are seeking to enforce? The 12th and 35th clauses of the deed are those which have relation to the borrowing of money. The 12th clause requires this to be done under the sanction of an extraordinary general meeting; and the 35th provides that "the directors shall have full power and authority on *behalf of the society to receive (and, with the consent of an [*746 extraordinary general meeting in the manner thereinbefore provided,) to borrow, on mortgage or otherwise," &c. Here, then, is a company completely registered, and having this limited power to borrow money. The only entry of a meeting or any authority to borrow money, is one that is found in a book which had been kept by the promoters of the company before its formation, and bearing date the 16th of May, 1851,—two days after the certificate of complete registration was obtained,—and containing the following resolutions: "1. That the capital stock of this society be increased from 10,000*l.* to 100,000*l.* 4. That the directors be hereby empowered to borrow any sum or sums of money, not exceeding in amount the present increased capital of the company, on debenture, under the common seal, or on such other security as to such directors shall seem fit." This is signed merely by the chairman; and there is no statement of any directors or shareholders being present. And at this time only twenty-nine persons had signed the deed of settlement. The authorities are numerous and clear, that the shareholders are bound only by contracts that are entered into in strict accordance with the provisions of the statute and of the deed. In Ridley *v.* The Plymouth Grinding and Baking Company, 2 Exch. 711, 717,† Parke, B., says: "The 7 & 8 Vict. c. 110, s. 7, provides that there shall be no complete registration of such a joint stock company until a copy of their deed of settlement shall have been delivered to the registrar of joint stock companies. It is, therefore, competent to every person dealing with such a company to ascertain the objects of the company, for the deed must specify them, and also who the directors are; and any person may find in that deed the duties of the directors and their powers as between them and the company. Therefore, every *person seeking to bind the company by a contract with the [*747 directors, must give some proof of their authority. I perfectly agree that the liability of the company may be shown without producing the original deed, or a copy of it, provided it be shown that all per-

(*a*) See the note at the end of the case.

sons who formed the company had sanctioned any particular individuals entering into contracts to bind them: if there were any proof of such authority, no doubt the company would be bound. This case fails, because it is not shown that the persons who entered into the contract, that is, the directors present at the board meeting, when there was some evidence of their sanctioning the agreement, were competent to bind the company." Similar language is used by Jervis, C. J., in giving judgment in Smith *v.* The Hull Glass Company, 11 C. B. 897, 926 (E. C. L. R. vol. 73). "Joint stock companies," he says, "it is now admitted, are not to be treated as ordinary trading partnerships: they are only bound by contracts made by the directors within the scope of their authority. The public have no right to complain. They know that the company is acting under the sanction and direction of an Act of Parliament and of a deed of settlement; and they have a ready access to that deed." And Maule, J., says: "The statute 7 & 8 Vict. c. 110 requires the deed of settlement to be registered, and that defines the purposes for which the company is incorporated, and the powers of the directors; and all persons who contract with the directors must be taken to be cognisant of the extent of the authority conferred upon them."(*a*) In giving the judgment of the court of error in The Royal British Bank *v.* Turquand, 25 Law J., Q. B. 317, Jervis, C. J., says it may now be taken for granted that dealing with companies of this sort is not the same thing as dealing with *(ordinary) trading partnerships; and that persons dealing with them are bound to read the statute and the deed of settlement. In Ernest *v.* Nicholls, 6 House of Lords Cases 401, 418, Lord Wensleydale gives a very lucid exposition of the law upon this subject. "It is obvious," he says, "that the law as to ordinary partnerships would be inapplicable to a company consisting of a great number of individuals contributing small sums to the common stock, in which case to allow each one to bind the other by any contract which he thought fit to enter into, even within the scope of the partnership business, would soon lead to the utter ruin of the contributories. On the other hand, the crown would not be likely to give them a charter which would leave the corporate property as the only fund to satisfy the creditors. The legislature then devised the plan of incorporating these companies in a manner unknown to the common law, with special powers of management and liabilities, providing at the same time that all the world should have notice who were the persons authorized to bind all the shareholders, by requiring the copartnership deed to be registered, certified by the directors, and made accessible to all; and, besides, including some clauses as to the management, as in the 7 & 8 Vict. c. 110, s. 7, &c. All persons, therefore, must take notice of the deed and the provisions of the act. If they do not choose to acquaint themselves with the powers of the directors, it is their own fault; and, if they give credit to any unauthorized persons, they must be contented to look to them only, and not to the company at large. *The stipulations of the deed, which restrict and regulate their authority, are obligatory on those who deal with the company; and the directors can make no contract so as to bind the whole body of shareholders, for whose protection the rules are made, unless they are strictly complied with.* Those provisions which

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(*a*) "But," he adds, "it by no means follows that they are to be taken to be cognisant of all the proceedings of the board of directors."

give to the directors discretionary *powers of management, do not affect strangers; and the shareholders are bound by the [*749 exercise of the discretion which they have consented to give. Other stipulations are directory merely, and do not constitute conditions to the exercise of the powers; but they form the subject of an action against the directors for the breach of their covenants express or implied in the deed. The great body of shareholders, for whose protection these limitations of authority are provided, cannot be affected unless they are complied with. They can only act and contract through their directors, and the acts of the individual shareholders have no effect whatever on the company at large. That this is the law, has been fully settled by several decisions." His Lordship then refers to Ridley *v.* The Plymouth Grinding and Baking Company, 2 Exch. 711,† The Kingsbridge Flour Mill Baking Company *v.* Ridley, 2 Exch. 711,† and Smith *v.* The Hull Glass Company, 8 C. B. 668 (E. C. L. R. vol. 65), 11 C. B. 897 (E. C. L. R. vol. 73).(*a*) That case conclusively establishes that all persons dealing with a joint stock company are bound to make themselves acquainted with the powers of the directors and the provisions of the deed of settlement. The relation of the directors to the shareholders is in truth a branch of the law of principal and agent. They are agents having a limited authority. The shareholders can only act through their directors: 7 & 8 Vict. c. 110, s. 27. [COCKBURN, C. J.—They must act through the directors, it is true: but they need not unless they choose give them power to borrow money.] That power is conferred by s. 25. [COCKBURN, C. J.—It may not be necessary to borrow money: the company may choose to carry on its business with ready money.] Where a man is dealing with an agent whom he knows to be acting under a limited authority, he is bound to ascertain its extent: *Story on Agency, § 77; Attwood *v.* Munnings, 7 B. & C. 278 [*750 (E. C. L. R. vol. 14), 1 M. & R. 66 (E. C. L. R. vol. 14); Alexander *v.* Mackenzie, 6 C. B. 766 (E. C. L. R. vol. 60). Knowing from the provisions of the deed of settlement that the power of the directors to borrow money was limited and fenced round by the special provisions contained in the 12th clause, it was the plaintiff's duty to ascertain if the requirements of that clause had been complied with. It is said that these provisions are directory only: but they are the very terms upon which alone the subscribers consent that the directors shall have power to pledge their credit. [CROWDER, J.—You contend that they are all conditions precedent to the validity of the contract?] Yes. The construction sought to be put upon the 44th and 46th sections of the statute, is not warranted either by the general scope of the act itself or by the authorities. The 44th section was intended to apply only where there is no provision in the deed of settlement as to the mode of making contracts. This is not the contract of the company. [CROWDER, J.—The common seal is affixed by the authority of three directors. Can you get rid of the effect of that, without showing fraud?] In Hill *v.* The Manchester and Salford Water Works Company, 5 B. & Ad. 866 (E. C. L. R. vol. 27), in an action against a corporation on a bond the condition of which recited that the company were by act of parliament authorized to raise money by bond, and that, at a general

(*a*) See the observations of Lord Cranworth, C., upon these cases, in Greenwood's Case, 3 De G. McN. & G. 459, 479.

assembly of the company of proprietors, it had been resolved that the bond in question should be issued for that purpose, the defendants pleaded non est factum: and it was held, that, although the company could not under that plea show that the bond executed by them was invalidated by collateral matter, they might show that it was void because executed contrary to the provisions of the Act of Parliament. [WILLIAMS, J.—The marginal note there is not quite a correct statement of the effect of the case: there, the seal was not lawfully *affixed to the instrument. COCKBURN, C. J.—Assuming that every individual who contracts with a joint stock company is bound to be cognisant of the contents of the deed of settlement,—how is he to know that all its requirements have been carried out by the directors?] The public are not bound to contract with joint stock companies. Besides, there are two parties whose interests are to be considered: the shareholders are entitled to the fair protection which the deed was designed to afford them. Cole v. Green, 6 M. & G. 872 (E. C. L. R. vol. 46), 7 Scott N. R. 682, has no bearing upon this case. It was not a case of principal and agent at all, but of individuals intrusted with the performance of certain duties. [WILLES, J.—How do you reconcile your argument with the decision in The Royal British Bank v. Turquand?] It is not, certainly, quite reconcilable with that case. But reliance is placed upon the opinion expressed by Lord Wensleydale in Ernest v. Nicholls, 6 House of Lords Cases 401. [CROWDER, J.—With every possible respect for the opinion of Lord Wensleydale, we are bound by the decision of the Exchequer Chamber in The Royal British Bank v. Turquand.] To decide in favour of the plaintiff in this case, the court must declare deeds of settlement to be little better than waste paper. The latter part of the judgment of the Exchequer Chamber in The Royal British Bank v. Turquand, is not warranted by either principle or authority. Besides, this case is distinguishable, on the ground that here there is not merely an absence of proof that the requisitions of the deed of settlement have been complied with, but positive proof, and that upon the face of the instruments themselves, that those requisitions have been wholly disregarded. [COCKBURN, C. J.—Reading the 28th clause in connection with the 27th, it seems doubtful whether it applies to loans of money on debentures.] The main ground upon which the argument is based, is, that the *directors stand in the position of agents having only a special and limited authority; and that every person who contracts with them is bound to ascertain whether that authority has been properly complied with or not.

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Bovill, in reply, was stopped by the court.

COCKBURN, C. J.—I am of opinion that our judgment must be for the plaintiffs. The action is brought upon certain debentures purporting to be issued under the seal of the society, and bearing the signature of two of the directors. Two objections to their validity have been urged,—first, that the directors are only empowered by the terms of their deed of settlement, executed pursuant to the provisions of the 7 & 8 Vict. c. 110, to issue these instruments under the sanction of a special general meeting of the shareholders authorizing it, and that, inasmuch as there was no such special general meeting duly convened according to the deed, there could be no valid resolution, and the resolution, whatever it was, gave the directors no authority which could be binding upon the

society,—secondly, that, even if there had been such authority to borrow money as is contemplated by the deed of settlement, the 28th clause requires, not only that the instrument shall be sealed with the seal of the company, but also that it be signed by *three* directors, whereas the debentures in question were signed only by *two*. As to the first objection, I think we are bound by the decision of the Exchequer Chamber in the case of The Royal Bank *v.* Turquand, 6 Ellis & B. 327 (E. C. L. R. vol. 88). There, the power to borrow was almost identical with that here; it was, that "the board of directors might borrow on mortgage, bond, or bill, in the name of, and, if necessary, under the common seal of, the company, such sum or sums of money as should from time to time, by a resolution passed at a general meeting of the company, be authorized to be borrowed;" *and the Court of Queen's Bench having held [*753
(5 Ellis & B. 248 (E. C. L. R. vol. 85)) that a plea founded on the alleged fact that there had been no resolution of the company to authorize the making of the bond, was bad, their decision was upheld by the Exchequer Chamber. That case is directly in point; and therefore it is unnecessary to go into the first question, inasmuch as it is one upon which we are not at liberty to exercise any discretion. The second question seems to me to be disposed of by a more minute examination of the deed of settlement. The 28th clause of that deed appears to have reference only to the instruments which are referred to in the 27th clause. Now, the 27th provides "that it shall be lawful for the directors of the said society to effect insurances on lives and survivorships, to sell out and purchase reversions and annuities, and to grant endowments for children, and generally to effect all such other insurances, whether life, guardian, guarantee, or otherwise, upon such terms and conditions and in such manner as the directors shall think proper." And the 28th goes on to say "that any policy, endowment, grant of annuity, or other instrument required *in any of the transactions aforesaid*, shall be given under the hands of not less than three of the directors, and sealed with the common seal of the society," &c. Reading these two clauses together, it seems to me that the provision in the 28th has reference exclusively to the various transactions, and to the instruments to be executed for the purpose of carrying them out, that are mentioned in the 27th clause. According to the ordinary rule of construction, where there are general words following particular ones, they are to be read as applicable to persons or things ejusdem generis with those that have gone before.(*a*) The words "other instrument" in the *28th clause must therefore be read as [*754
applicable to insurances, sales or purchases of reversions, annuities, and endowments. And this is rendered more clear by the words which follow, "required in any of the transactions aforesaid;" for, there is no previous mention of any transaction relating to the borrowing of money and granting debentures,—the only provision which could be urged as so applying being the 12th clause, which provides "that it shall be competent for any extraordinary general meeting, and no other, and such meeting and no other is hereby empowered, by a majority which shall consist of at least two-thirds in number of the shareholders of the society for the time being, &c., to increase the capital stock of the society, and for that purpose to create a sufficient number of new or additional shares, &c.,

(*a*) See Dwarris on Statutes, 2d edit. 621, 657.

and also to empower and require the directors to borrow or take up on mortgage of the real estate or chattels belonging to the society, or on such other securities as to such meeting may seem fit, any sum of money which such meeting may deem expedient," &c. That only provides generally that an extraordinary general meeting of the shareholders may grant power to the directors to borrow money under special and extraordinary circumstances. Seeing the long interval between that clause and the 28th, I cannot reconcile my mind to the supposition that it could be one of the "transactions" intended to be referred to in the last-mentioned clause. This renders it unnecessary to inquire whether or not the 44th and 46th sections of the 7 & 8 Vict. c. 110 apply to this case. It seems to me to be very clear that the 28th clause refers to the 27th only; and for these reasons I am of opinion that the plaintiff is entitled to succeed upon both points.

WILLIAMS, J.—I am entirely of the same opinion. As to the objec-
*755] tions which are not founded upon the *28th clause of the deed of settlement, I agree with the Lord Chief Justice in thinking that it is enough to say that this case is governed by that of The Royal British Bank *v.* Turquand, 6 Ellis & B. 227 (E. C. L. R. vol. 88). It is agreed that the facts shall be given in evidence under non est factum: if extended in a plea, it would be precisely in the terms of that case. As to the objection arising on the 28th clause, I should have great difficulty in coming to the conclusion contended for on the part of the defendants. In the first place, I doubt whether it was competent to the company to stipulate that a contract which the statute (ss. 44, 46) declares valid if signed by two directors, shall not be valid unless signed by three. Again, I doubt the accuracy of the law as laid down by Lord Wensleydale in Ernest *v.* Nicholls,—at least to the extent to which he goes. But it is unnecessary to consider these points, because I entirely concur with my Lord in thinking that the 28th clause of the deed of settlement was meant to apply only to the transactions referred to in the 27th: and that clearly will not include a transaction of this sort.

CROWDER, J.—I am of the same opinion upon both points. I was party to the decision of the Exchequer Chamber in The Royal British Bank *v.* Turquand: and, not only do I think we are bound by it, but I am persuaded that it is a right decision, and must govern this case. There, there was an allegation in the plea, that there was no resolution authorizing the making of the bond, and the plea was held bad. Assuming that it was proved here that there was no such meeting or resolution as the deed of settlement requires, the case stands in this respect precisely on the same footing as the plea in that case. With regard to the attempted distinction on the second point, that there is enough on
*756] the face of them to nullify these debentures, inasmuch as *they have only the signature of two directors, whereas the 28th clause of the deed requires that of three,—I incline to think with my Lord that the 28th clause applies only to the instruments and transactions referred to in the 27th. I do not, however, wish to be understood as giving a positive opinion upon that point, not having had sufficient time to consider it. But I am clearly of opinion that the want of the required number of signatures does not in the slightest degree affect the validity of the document. In any way, therefore, of construing the 28th clause,—whether as referring to the 27th clause or to the 12th,—

it seems to me that it affords no answer to the argument which has been urged on the part of the plaintiffs.

WILLES, J.—I am of the same opinion. As a general rule, a corporation is bound by an instrument under its seal, unless it can be shown that its execution was obtained by fraud, or there is some illegality in the transaction. There is nothing of the sort here, and therefore nothing to take this case out of the general rule.

Judgment for the plaintiffs.(*a*)

(*a*) The Court of Queen's Bench gave judgment in the case of The Prince of Wales Assurance Society *v.* The Athenæum Assurance Society, in Easter Term, 1858, holding that a policy bonâ fide executed by three directors under the seal of the company was not void because there had been no previous order of three directors (countersigned as required by the 20th clause of the deed) for affixing the seal thereto. See 31 Law Times 149.

Lord Campbell, in giving judgment, after stating the facts, says,—"Under these circumstances, the defendants' counsel contended that they were entitled to have the verdict entered for them on the pleas of non est factum, and that they had not granted the policies; that the previous order was a condition precedent to the power of the directors to affix the seal to the policies, so that without proving such an order a primâ facie *case could not be made out for the plaintiffs; that, for the want of previous orders signed by three directors [*757 and the manager under sect. 20 of the deed of settlement, the policies were absolute nullities, and were incapable of confirmation by the defendants, although the plaintiffs might have regularly paid and the company received the premiums upon them for twenty years, although the premiums during all that time might have increased the dividends received by the shareholders, and although the granting of the policies was within the scope of the general authority of the directors and for the benefit of the shareholders. This reasoning proceeds upon the assumption that all who deal with the company have notice, before any negotiation begins, of the deed of settlement, and are bound to make themselves masters of its contents. But, if it were established that all the world must be presumed to have notice of all the contents of all the deeds of settlement framed by all the companies under the 7 & 8 Vict. c. 110, does it follow that a policy under the seal of such a company, which is bonâ fide entered into, which is not contrary to the rules of the common law nor to any enactment in the 7 & 8 Vict. c. 110, or in any other statute, and which, when executed, may have been for the benefit of the shareholders, is absolutely void if any formality has been omitted which is prescribed by the deed of settlement? If a deed under the seal of the company contains matter contrary to the deed of settlement, of which the party dealing with the company has notice, and this works a prejudice to the shareholders, we do not doubt that the deed is illegal, and that it may be avoided by a special plea disclosing the illegality. But the simple omission of a formality, or variation from the form required by an article in the deed of settlement does not, we conceive, make a deed under the seal of the company a nullity. We consider the directions in sect. 20 of this deed of settlement to be only for the guidance of the directors, and to be intended to operate only as between them and the shareholders. If, from neglecting them, any prejudice arises to the shareholders by too many risks being taken, or in any other way, the directors may be liable to the shareholders; but this is very different from saying that a party who has bonâ fide insured a sum of money by such a deed on a life, should lose that money when the life drops, and shall lose all the premiums he has *paid upon it, although, when the policy was executed, it was an advantageous bargain for the shareholders. If a customer dealing with this [*758 company for a life policy is bound to inspect the deed of settlement at all, he surely has done enough if he attends to sect. 28, which regulates the manner in which policies shall be framed and executed. And the policies in question are in all respects framed and executed according to the rules there laid down." "It is truly said that such regulations are introduced into the deed of settlement for the protection of the shareholders; but the shareholders have reasonable protection from them without saying that any departure from the regulations must of necessity nullify the policy, for, if they are violated by the directors, the directors are answerable for the breach of them to the shareholders; and, if there has been an illegal agreement between the directors and the party effecting the policy, to the prejudice of the shareholders, the policy would be illegal, and by a special plea it might be avoided. We must bear in mind that there are no nullifying words in the 20th section of the deed of settlement, and that they may well be considered as directory, instead of creating by implication a condition precedent, which might work such enormous injustice. Wherever the party dealing with such company knowingly combines with the directors to do any act ultrà vires, to the prejudice of the shareholders,—as, for instance, to throw upon them unlimited liability, whereas the directors are required so to frame policies as to confine the remedy of the assured to the capital and funds

in the hands of the company,—the shareholders might very fairly and reasonably deny their liability on the policy: but it would be most unjust to allow them to take advantage of an irregularity of the directors (who are denominated their agents), although they cannot show that they are in any respect prejudiced by the irregularity, and the assured cannot be charged with any fraud or impropriety. The question is, did the legislature mean that the company may avoid all their contracts unless the formalities prescribed by the statute and the deed of settlement, both in the form of the contract and in the process of making it, have been complied with. In support of the affirmative, it is said that the directors are agents with limited authority; that the contractors have notice of the limit, because the statute confers the authority subject to the *provisions of the act and the deed of settlement, which is registered *759] for public inspection; that the shareholders are the principals, and that they have an unlimited power of repudiation,—although this would be an unlimited power to defraud. Conceding the impossible supposition that every contractor has read and understood all these provisions, the statute relied upon would have effect, if these provisions were held to create a duty in the directors and shareholders inter se, and thus enabling the company to avoid contracts in which some of the provisions are not complied with, if the contractor, with actual notice of the provisions, has knowingly combined with the directors to omit them, to the prejudice of the shareholders, as in the case of partnership deeds."

His lordship then observes at some length upon the various provisions in the statute and in the deed, and also upon the cases of Ridley v. The Plymouth Grinding and Baking Company, 2 Exch. 711,† Ernest v. Nicholls, 6 House of Lords Cases 401, Smith v. The Hull Glass Company, 8 C. B. 668 (E. C. L. R. vol. 65), 11 C. B. 897 (E. C. L. R. vol. 73), Hill v. The Manchester and Salford Water Works Company, 2 B. & Ad. 554 (E. C. L. R. vol. 22), Horton v. The Westminster Improvement Commissioners, 7 Exch. 780,† The Royal British Bank v. Turquand, 5 Ellis & B. 248 (E. C. L. R. vol. 85), 7 Ellis & B. 327, Agar v. The Athenæum Life Assurance Society, 3 C. B. (N. S.) 725 (E. C. L. R. vol. 90), Bill v. The Darenth Valley Railway Company, 2 Hurlst. & N. 305,† and Bargate v. Shortridge, 5 House of Lords Cases 310.

Speaking of Ernest v. Nicholls, he says,—"We are, of course, bound by the judgment of the House of Lords in that case, and we should all most heartily have concurred in it, the question having been 'as to a special contract to do the very unusual thing of purchasing by one company the trade of another.' But we are not bound by the extrajudicial observations of any noble and learned lord delivered in that assembly, though they are, no doubt, entitled to high consideration." And he concludes this part of his judgment thus,—"For these reasons and on these authorities we think, that, notwithstanding the dicta of the noble and learned lords referred to, the verdict for the plaintiffs on the pleas of non est factum, and that the defendants' company did not grant the policies, ought not to be disturbed. Our apology for entering so much at length into these comments on the statute and the authorities, is, to show our respect for the two noble and learned lords whose dicta were cited."

*760] *PELLATT v. MARKWICK. *Jan.* 27.

The court refused to refer an action upon bills of exchange to the master, under the compulsory clauses of the Common Law Procedure Act, 1854.

THIS was an action to recover 466*l.* 7*s.* for principal and interest due upon six bills of exchange drawn by the defendant upon and accepted by one Alfred Markwick.

Upon an affidavit by the plaintiff's attorney, that he was informed and believed that the acceptor of the bills had since the date thereof been adjudged a bankrupt, that a small dividend had been received by the plaintiff out of his estate in respect of the bills, and that, on being served with the copy writ of summons in this action, the defendant admitted having drawn the bills,

Aspland moved for a rule calling upon the defendant to show cause why the case should not be referred to the Master under the 3d section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. [COCKBURN, C. J.—What is there to show that the matter in dispute here cannot conveniently be tried in the ordinary way?] The plaintiff is natu-

rally anxious to avoid the unnecessary expense and delay of a trial, where there can be nothing in dispute. [COCKBURN, C. J.—The object of the statute was to relieve the court from the necessity of trying complicated questions of account.] It is the practice at Chambers to make such orders in cases of this sort.

COCKBURN, C. J.—The 3d section of the 17 & 18 Vict. c. 125, provides, that, if it be made to appear to the satisfaction of the court or a judge that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the *ordinary way, it shall be lawful for the court or judge to refer it to [*761 an arbitrator or to the Master. Here, the plaintiff sues the defendant as the drawer of certain bills. It is not a matter of mere account. The clause clearly was not meant to apply to such a case.

WILLIAMS, J., and WILLES, J., concurring,(a) Rule refused.

(a) Crowder, J., was absent.

HELLIWELL *v.* HOBSON and Anothers. *Jan.* 28.

The court will not deprive the plaintiff of the right to lay his venue where he pleases, unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to change the venue.

THIS was an action brought by the plaintiff against the defendants for having published in a newspaper called the Derbyshire Advertiser, and Derby, Ashbourne, Wirksworth, Belper, Uttoxeter, and North Staffordshire Journal, the following alleged libel against him:—"Mr. and Mrs. German Reed's entertainment, and the librarian to the Mechanics' Institute (thereby meaning the plaintiff). On Friday evening last, Mr. and Mrs. German Reed gave their admirable entertainment in the Lecture Hall, Derby. The attendance was satisfactory, and the performance was extremely well received. Some of our readers may probably have remarked that this entertainment was not announced in the Derbyshire Advertiser; and, as the omission was equally unjust to ourselves and to Mr. and Mrs. Reed, we may with propriety mention the cause of it here. It appears (and we state the fact from a conversation with Mr. Reed himself) that Mr. Helliwell (meaning the plaintiff), the librarian to the Derby Mechanics' *Institute, received instruc- [*762 tions from Mr. Reed to advertise the entertainment in the Derby papers, and to forward the usual free tickets to the editor of each journal. Presuming on his (meaning the plaintiff's) position, and thinking, perhaps, that he could with safety gratify a personal feeling towards this journal, Mr. Helliwell (meaning the plaintiff) disregarded these orders: the advertisement was forwarded to the Mercury and the Reporter, but neither advertisement nor ticket found its way to our office. The subject is only worth alluding to, in order to place professionals who may intend to visit Derby on their guard; so that they may not in future be defrauded of that publicity which they desire. Mr. Helliwell (meaning the plaintiff) should know, too, that he will not be allowed to pursue with impunity a similar course of conduct to that of which we have had to complain."

The plaintiff having delivered his declaration, laying the venue in Middlesex, the defendants pleaded not guilty, and a justification averring the alleged libel to be true; and now

Archibald moved for a rule nisi to change the venue to Derbyshire. The motion was founded upon an affidavit which stated, that the newspaper in which the alleged libel was published was printed and published at Derby, and that the principal circulation thereof was in Derby, and it had but a very small circulation in Middlesex; that the defendants had at least five or more material witnesses to establish their defence, the whole of whom resided in Derby or the neighbourhood, and none of whom resided in Middlesex, except Mr. Reed, who, it was believed, resided in London, but was constantly travelling about; that the defendants themselves, who would necessarily be called as witnesses, resided near Derby; that the plaintiff resided at Derby, and it was believed all
*763] the witnesses whom the *plaintiff could subpœna in support of his case resided at or near Derby, and that he had no material witness residing elsewhere, unless it were Mr. Reed, whom the defendants intended to subpœna; that, if the cause were tried in Middlesex, the expenses would be at least 80*l.* more than if it took place in Derby; that the plaintiff was in very poor circumstances, and it was extremely probable that he would not be able to pay the defendants' costs in case he failed in the action; that the deponent had read an affidavit of the plaintiff, in which he alleged his belief that he could not have a fair and impartial trial in Derby, by reason of the prejudice excited against him by the circulations of placards tending to vilify his character; that the deponent believed that the class of persons likely to sit on the jury at the assizes for Derby were not likely to be prejudiced against the plaintiff, and that the plaintiff could have as fair and impartial a trial in that county as in Middlesex. The affidavit concluded with a positive denial that the defendants or either of them were directly or indirectly concerned in the printing or circulation of the placards referred to.

CROWDER, J.—I think no sufficient ground has been laid for changing the venue in this case. The plaintiff had the right to lay his venue where he chose. And, from the circumstance of the newspaper containing the libel being published in Derby, and the circulation of offensive placards there, the plaintiff might fairly apprehend that he would not have an impartial trial there. And it is not shown what witnesses he may have. I therefore do not think the defendants have made out any case to entitle them to a rule. It should at least be made to appear that the convenience of a trial at Derby greatly preponderates.

Rule refused.

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*764] *DOYE *v.* ELEY, a Prisoner. *Jan.* 29.

Where an application for the discharge of a prisoner, under the 48 G. 3, c. 123, on the ground that he has been detained in execution for a year for a sum under 20*l.*, is made before the expiration of the ten days' notice mentioned in the 129th rule of Hilary, 1853, a rule nisi only can be granted.

HEATON moved for the discharge of the defendant under the 48 G. 3, c. 123, he having been detained in execution at the suit of the plaintiff in this action for twelve months for less than 20*l.*, exclusive of costs. It

appeared that the notice of the intended application had not been given until the 26th instant. [WILLES, J., referred to the 129th rule of Hilary, 1853,(a) which provides that "a rule or order for the discharge of a prisoner who has been detained in execution a year for a sum under 20*l.*, may be made absolute in the first instance, on an affidavit of notice given ten days before the intended application, which notice may be given before the year expires." In the absence of a proper notice, you can only have a rule nisi.] The language of the rule is affirmative only: it is in the discretion of the court.

COCKBURN, C. J.—We can only grant a rule nisi. The plaintiff has a right to expect that the application to the court will not be made until the 11th day.

The rest of the court concurring, A rule nisi was granted.(b).

(a) See 13 C. B. 33 (E. C. L. R. vol. 76). (b) See the next case.

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*HUMPHREYS *v.* HARRIET FRANKS, a Prisoner. *Feb.* 1. [*765

A defendant who has lain in prison in execution on a judgment in ejectment for more than twelve months, is still entitled to be discharged on motion, under the 48 G. 3, c. 123, s. 1, notwithstanding the alteration in the form of the proceedings under the Common Law Procedure Act, 1852.

PEARCE moved for a rule absolute under the 48 G. 3, c. 123, s. 1, to discharge the defendant from custody under an execution in an action of ejectment, she having lain in prison for more than twelve months for the costs of an action of ejectment, amounting to 90*l.* 2*s.* 4*d.* The action had been commenced since the coming into operation of the Common Law Procedure Act, 1852. The proper ten days' notice was given on the 12th of January. He referred to Doe d. Threlfall *v.* Ward, 2 M. & W. 65,† and Doe d. Daffey *v.* Sinclair, 5 Dowl. P. C. 615, to show, that, before the late act, a defendant in custody for the nominal damages and costs in an action of ejectment was entitled to be discharged under the act. The question was whether the alteration in the nature and form of the action of ejectment effected by the 168th and following sections of that act took the case out of the operation of the 48 G. 3, c. 123. [WILLES, J.—The question is, whether the language of the 207th section of the Common Law Procedure Act, 1852,—that "the effect of a judgment in an action of ejectment under this act, shall be the same as that of a judgment in the action of ejectment heretofore used,"—is sufficient to bring the new form of proceeding within the 48 G. 3, c. 123.]

Holl showed cause.—The 48 G. 3, c. 123, was not intended to apply to actions of this sort. The 1st section recites that "it might tend greatly to the relief of certain debtors in execution for small debts, and at the same time occasion no material prejudice to trade and public credit, if such debtors should, after a limited period of imprisonment, be allowed the benefit of a *discharge therefrom, the creditors at [*766 whose suit they were so in execution being at the same time authorized to take out other writs of execution against the land and goods of such debtors, or to use other remedy for the satisfaction of their debts,

as if the persons of such debtors had never been taken in execution:" and it then enacts that all persons in execution upon any judgment for any *debt or damages* not exceeding 20*l.*, exclusive of the costs recovered by such judgment, and who shall have lain in prison thereupon for the space of twelve successive calendar months, shall be forthwith discharged out of custody as to such execution, by the rule or order of the court. [WILLES, J.—Do you dispute that that statute applies to a judgment in ejectment?] The Court of Queen's Bench held that it did not, in the case of Doe *v.* Reynolds, 10 B. & C. 481 (E. C. L. R. vol. 21), where Lord Tenterden says: "The object of the statute was, to relieve persons in execution upon a judgment for a debt or damages. Here, the defendant is in execution for the costs of an ejectment. The object of a party instituting such a proceeding, is, to recover the possession of the land, and not any debt or damages." [COCKBURN, C. J.—Ejectment has repeatedly since that time been held to be within the 48 G. 3, c. 123. Then comes the 207th section of the 15 & 16 Vict. c. 76, which says that the effect of a judgment in ejectment under this act shall be the same as that of a judgment in ejectment was before.] In Doe d. Threlfall *v.* Ward, 2 M. & W. 65,† the Court of Exchequer held themselves bound by the strict letter of the statute, though they thought the case not within its spirit. Now, it is no longer even within the words of the statute; for, no damages are recovered in ejectment, but merely the possession of the land. [WILLIAMS, J.—Do you contend that the legislature, in passing the Common Law Procedure Act, 1852, intended *767] to alter the settled law in *this respect?] It would hardly, perhaps, be justifiable to press the argument so far as that: but, the technical ground of the former decisions having ceased, the court will, it is submitted, cease to give a technical effect to the words of the old statute, and adopt the conclusion of Lord Tenterden in Doe *v.* Reynolds.

COCKBURN, C. J.—I am of opinion that the defendant is entitled to be discharged from custody under the execution in this action. It is admitted, on the part of the plaintiff, that, prior to the passing of the Common Law Procedure Act, 1852, a defendant who had been in custody in execution for the nominal damages and costs in an action of ejectment for more than twelve successive calendar months, was entitled to be discharged by virtue of the 48 G. 3, c. 123, s. 1. If the question had now arisen for the first time, I must confess I should have entertained considerable doubts whether the provision in that statute ought to be applied to an action of ejectment. But the law upon that subject has long since been settled; the case of Doe *v.* Reynolds, 10 B. & C. 481 (E. C. L. R. vol. 21), having been distinctly overruled by subsequent decisions. Then comes the question whether the Common Law Procedure Act, 1852, has in any way altered the state of the matter. I am clearly of opinion that it has not. The 207th section enacts that the effect of a judgment in an action of ejectment under that act shall be the same as that of a judgment in an action of ejectment theretofore used. There being this express provision, that although the form of the judgment in ejectment is somewhat altered, it is to have the same effect as it had before the passing of the act, I think it is impossible to say that the operation of that section is not to reserve to the defendant all *768] the advantages which the law before allowed him, and, amongst others, the right to claim his *discharge under the 48 G. 3, c.

123. For these reasons, I am of opinion that this rule ought to be made absolute.

WILLIAMS, J.—I am of the same opinion. Whatever was the intention of the framers of the statute 48 G. 3, c. 123, its language was such as induced the courts, after considerable controversy, to hold that they were not at liberty to decline to apply it to the case of a defendant in execution in an action of ejectment, being of opinion that the plaintiff did in that form of action recover damages, though nominal. That being so, the question is, whether the provisions of the Common Law Procedure Act, 1852, was intended to alter, or has the effect of altering, the law in that respect. Now, seeing that the object of that statute was merely to alter the *procedure*, I think it would be a strong thing to hold that the effect of it was to make a substantive alteration in the law in this respect. No doubt it must have occurred to the legislature that points like this might arise; and therefore, to obviate inconvenience, the sweeping provision in s. 107 was introduced, that the effect of the judgment in ejectment in its new form shall be the same as the former judgment. Before that statute, the effect of a judgment for the plaintiff in ejectment was, to enable the plaintiff to keep the defendant in execution only for twelve months. To accede to the argument of Mr. *Holl*, would be to hold that the effect of the judgment is altered in a most material respect.

WILLES, J., concurred. Rule absolute.

*PERRY *v.* DAVIS and Others. *Jan.* 13. [*769

Premises consisting of a wharf and dock, dwelling-house, wash-house, and court-yard, were demised under a lease containing a covenant that the lessee, his executors, &c., should not erect or build any edifice or structure whatsoever on the wharf and dock, or place goods thereon above a certain height, &c., "nor do any other matter or thing of any nature or kind which might obstruct the view of the river from the White Hart public-house, or that should grow or be a nuisance or annoyance to the occupier thereof," nor carry on a certain trade thereon, "nor make any external alteration whatsoever in the said premises, nor any internal alterations in the said dwelling-house that may lessen the value thereof, without the consent in writing of the lessor for that purpose;" with a proviso for re-entry for a breach:—

Held, that this covenant absolutely prohibited all *external* alteration in any part of the demised premises, and that the qualification as to lessening "the value thereof" applied only to *internal* alterations in the *dwelling-house*.

Mere standing by and seeing the lessee making alterations which are in breach of his covenant, does not operate as a waiver on the part of the lessor.

EJECTMENT for a forfeiture. The defendant Davis was sub-lessee under the plaintiff (and the other two defendants under him) of premises in Duke Street, Chelsea, held under a lease of the 12th of June, 1830, which contained, amongst others, the following covenant:—(*a*)

"That the said John Francis Berry, his executors, &c., should not nor would at any time or times during the said term thereby granted erect or build, or cause to be erected or built, any edifice or structure whatsoever on the said piece or parcel of land and dock, or any part thereof, thereby demised, whereon formerly stood a boat-house, or lay or cause to be laid or placed on the said land or dock any timber, coal, or any

(*a*) This is taken from the sub-lease; but it was in the same terms as the lease from Perry to Davis.

other description of merchandise or other things which should at any time or times during the said term exceed in height the highest part thereof, or any part thereof, three feet above the level in Duke Street aforesaid, except only carts, wagons, or other carriages standing to load or unload on the said land or dock, or enclose the said land or dock at any time during the said term otherwise than with open palisadoes not exceeding in height in any part thereof six feet above the said level of Duke Street aforesaid, the same to be fixed on a dwarf wall or other
*770] foundation not to exceed the height *of one foot above the level of the said street, such foundation and palisadoes to be of any materials the said John Francis Berry, his executors, &c., shall think fit; nor do any other matter or thing of any nature or kind which may obstruct the view of the river from the White Hart public-house, or that shall grow or be a nuisance or annoyance to the occupier or occupiers thereof; nor use the said demised premises, or any part thereof, for the purpose of carrying on therein the trade or business of an undertaker and carpenter, or either of them, nor raise the roof of the wash-house belonging to the said premises above the present height thereof, nor make any external alteration whatsoever in the said premises, nor any internal alterations in the said dwelling-house, *that may lessen the value thereof*, without the consent in writing of the said John Davis, his executors, &c., for that purpose." And there was a proviso for re-entry if the rent should be in arrear twenty days, "or if any breach or failure should happen to be made in any or either of the covenants, &c., on the part of Berry, his executors," &c.

The cause was tried before Crowder, J., at the sittings at Westminster after last Trinity Term. The premises in question consisted of a dwelling-house and offices and a small piece of land or wharf and dock abutting on the Thames, opposite a public-house called The White Hart. The alleged ground of forfeiture was, that the defendants had made alterations in the premises in contravention of the above covenant,—by raising the river wall three feet, removing the coping and iron railing therefrom, and placing thereon a piece of timber about a foot thick, and raising the level of the wharf three feet,—and had created a nuisance thereon by making the wharf a receptacle for manure. There was conflicting evidence as to the nuisance, and also as to whether or not the
*771] alterations (which consisted, amongst *others, of raising the river wall and the level of the wharf, and also the roof of the wash-house), were improvements: and these questions were disposed of by the jury finding in the negative as to the former, and in the affirmative as to the latter.

It appeared, that, whilst the alterations were going on, the plaintiff was repeatedly on the premises, near which he resided, that he read over the covenant to Davis and told him he could not without a written license do what he was doing, but did not further complain.

This was relied on for the defendants as a waiver of the alleged forfeiture: and it was contended that the words, "that may lessen the value thereof," applied to and overrode the whole of the covenant as to the alterations, and consequently that, the jury having negatived the lessening of the value, there was no breach of the covenant.

On the other hand, it was insisted that those words of qualification applied only to the *internal* alterations,—that the covenant wholly in-

terdicted the making of external alteration, and the making of such internal alterations as might lessen the value of the premises.

The learned judge was of opinion that this was the true construction of the covenant: but, the jury having found that there was a waiver, a verdict was entered for the defendants, with leave to the plaintiff to move: and leave was also reserved to the defendants to move as to the construction of the covenant.

Atherton, Q. C., in Michaelmas Term last, accordingly obtained a rule nisi to enter a verdict for the plaintiff "on the ground that there was no evidence to go to the jury of the plaintiff having waived the breach of the covenant not to make external alterations in the demised premises, —the defendants to be at liberty, on *the argument of the rule, [*772 to contend that the covenant was not shown to have been broken and therefore no forfeiture was shown, on the ground that the terms as to alterations lessening the value applies to external alterations."

Montague Smith, Q. C., *Hugh Hill*, Q. C., and *Cleave*, showed cause.—There was no breach of the covenant in question. There is first an absolute covenant against the erection of any edifice or structure, however valuable or costly, on any part of the wharf or dock, or the doing anything to obstruct the view of the river from the White Hart public-house. [COCKBURN, C. J.—If "premises" includes the wharf, none of *these* covenants would be necessary.] Certainly not. The court will, if possible, put a consistent and harmonious construction upon the whole instrument. The covenant then goes on, "nor raise the roof of the wash-house belonging to the said premises above the present height thereof, nor make any external alteration whatsoever in the said premises, nor any internal alterations in the said dwelling-house, that may lessen the value thereof, without the consent in writing of the lessor." The construction sought to be put upon this covenant on the part of the plaintiff, is, that it is an *absolute* covenant against *external* alteration, and a *qualified* covenant against such *internal* alterations as may lessen the value of the premises. This, it is submitted, is not the fair and natural meaning of the covenant, which is entire and all contained in one sentence: "thereof" refers, not to the dwelling-house only, but to the whole subject-matter of the demise. The prohibition as to the river frontage in the other part of the covenant shows that this is the true construction. [COCKBURN, C. J.—There cannot be "internal" alterations in a *wharf*.] Certain things which are absolutely prohibited are specified: *and then that which the lessee *may* do is to be subject to the [*773 qualification that they shall be such things as may not lessen the value of the premises. There is nothing unreasonable in this view: and, if the construction be doubtful or the language ambiguous, the court will rather lean against a forfeiture. As to the waiver,—in the absence of evidence of any substantive act done by the lessor, such as the acceptance of rent, it must be conceded that the case is not free from difficulty. There are, however, cases in equity where a landlord, having, with knowledge of the forfeiture, encouraged the tenant to lay out money on the premises, has been precluded from taking advantage of the forfeiture. Here, the evidence was, that the plaintiff, who resided on the spot, was repeatedly on the premises while the alterations (which occupied a considerable time) were going on, and said nothing. [WILLIAMS, J.—Can his doing and saying nothing amount to a waiver, where his assent orally

would not?] His assent given orally after the alterations had been made, would, it is submitted, have operated a waiver. In Doe d. Sheppard *v.* Allen, 3 Taunt. 78, where a question of this sort arose, Sir J. Mansfield says,—"It was suggested that a great deal of money had been laid out by the defendant in altering and improving these premises; that was not merely a circumstance for the consideration of a court of equity: if the plaintiff lay by and saw that laid out, it was a strong circumstance from which a jury might imply consent to the alteration." [WILLIAMS, J. —The *decision* there was, that some positive act of waiver is necessary: and Heath, J., says: "There are a great many cases in the old books, where it is held that a mere knowledge and acquiescence in an act constituting a forfeiture, does not amount to a waiver.] In Doe d. Knight *v.* Rowe, R. & M. 343 (E. C. L. R. vol. 21), which was an ejectment on *774] a forfeiture for breach of covenant in a lease wherein *the lessee covenanted to insure in the joint names of himself and the lessor, and in two-thirds of the value of the premises demised,—it appeared, that the lessee had insured in his own name only, and, as contended, to a less amount than two-thirds of the value of the premises; that both parts of the lease remained in the possession of the lessor, and an abstract only had been delivered by him to the lessee, which contained no mention that the insurance was to be in the joint names, though it stated that the insurance was to be in two-thirds of the value of the premises; and that the lessor of the plaintiff had previously insured the premises at the same sum as the defendant had: and it was held by Abbott, C. J., that the conduct of the lessor being such as to induce a reasonable and cautious man to conclude he was doing all that was necessary or required of him by insuring in his own name and to the amount insured, he could not recover for a forfeiture, though there was no dispensation or release from the covenant.

Atherton, Q. C., and *Cook Evans*, in support of the rule.—The premises demised are described in the lease as "wharf, dwelling-house, wash-house, and court-yard." There appears to have been a strong desire on the part of the lessor to prevent all interference with the appearance of the outside of the premises: and this may account for the redundant expressions found in the covenant. It begins with an absolute and unqualified prohibition to erect any edifice or structure *whatsoever* on the piece of ground on which the boat-house formerly stood. Then we come to that part which forbids even a temporary encumbrance or interference with the outside of the premises,—"or lay or cause to be laid or placed on the said land or dock any timber, coal, or any other description of *775] merchandise or other things *which should at any time during the term exceed in height three feet above the level in Duke Street," except carts, &c., standing to load or unload; "or enclose the said land or dock at any time during the term otherwise than with open palisadoes not exceeding in height six feet above the level of Duke Street," &c. Having thus particularly specified what was more immediately within their minds, the parties then go on with more general words, which might of themselves have covered all that the former portions of the covenant pointed at,—"nor do any other matter or thing of any nature or kind which may obstruct the view of the river from the White Hart public-house, or that shall grow or be a nuisance or annoyance to the occupier or occupiers thereof." Then comes that part of the covenant upon which

the question more immediately arises,—"nor raise the roof of the wash-house belonging to the said premises above the present height thereof, *nor make any external alteration whatsoever in the said premises, nor any internal alterations in the said dwelling-house that may lessen the value thereof*, without the consent in writing of the lessors for that purpose." The fair construction of that covenant manifestly is, that no external alterations shall be made, whatever may be their effect upon the value of the premises; and no internal alterations in the dwelling-house, that might lessen its value, without the consent in writing of the lessor. This, it is submitted, is giving to the word "whatsoever" its legal and proper signification,—kind and consequences; reading the covenant thus "nor make any *external* alteration in the premises of any kind or whatever its consequences, nor any *internal* alterations in the dwelling-house that may lessen the value thereof, without the consent in writing of the lessor." [COCKBURN, C. J.—Must we not read "external" in opposition to "internal?" It can only apply to something which has an *outside and an inside. WILLIAMS, J.—It would have been quite clear, [*776 if the latter part of the sentence had been put first.] As to the alleged waiver, there clearly was no evidence to sustain that. [COCKBURN, C. J.—You need not trouble yourself as to that.]

COCKBURN, C. J.—I am of opinion that the rule to enter a verdict for the plaintiff should be made absolute. The covenant is drawn in language so ambiguous and confused as to render it a matter of great difficulty to know what construction to put upon it. But, upon the whole, I think a forfeiture has been established, on this ground:—I do not agree that the alterations which shall not diminish the value were intended to apply to *external* alterations; for, according to the ordinary rule of grammatical construction, the word "thereof" must apply to the last antecedent, which would confine it to *internal* alterations in the dwelling-house. It seems to me that the language of the entire covenant is more consistent with that construction than the other: there shall be no external alteration whatsoever in the premises (whether it may lessen or increase their value), and no internal alterations in the dwelling-house that may lessen its value, without the consent in writing of the lessor. My only doubt arises from the difficulty of giving any sensible construction to the words external and internal as applicable to a thing which is not susceptible of internal alterations. "The premises," properly speaking, are the demised premises, which includes the whole. I do not, however, think it right to stand out against the opinions of my learned Brothers, and therefore I think the rule should be made absolute.

WILLIAMS, J.—I am of the same opinion. I must confess I have entertained considerable doubt during the course of the argument: but, upon the whole, I think the alterations here were external within the meaning *of the covenant. At first I was inclined to think that [*777 this part of the covenant was intended to apply to that portion of the premises which had an outside and an inside. But I have come to the conclusion that the word "external" was meant to apply to everything external to the house, or, as it is popularly called, "out of doors." The arises the second question, whether the words "that may lessen the value thereof" were intended as a qualification of the former part of the covenant. I think they were not. External alterations are absolutely prohibited by the word "whatsoever:" but that word is not applied to

the internal alterations, and therefore they were not meant to be in the same category. What, then, are they to be? Such as do not lessen the value of the dwelling-house. If so, the expression is, so to say, exhausted, and cannot be applied to the preceding part of the sentence. The evident intention of the parties was, that the outside of the premises should be left as it was. As to the alleged waiver,—mere lying by will not do; there must be some positive act of waiver.

CROWDER, J.—I also think the covenant has been broken, and, therefore, that there has been a forfeiture. The first view thrown out was, that the word "external" was apparently used in contradistinction to "internal." I think, however, upon consideration, that it clearly means external to the building which is let as part of the premises,—all that is outside the house is external. I therefore think there would have been a breach as to that. Any alteration in the said premises, must be in the demised premises,—the whole of the premises comprised in the lease. The main question is, whether, to constitute a breach, the alteration must be one that lessens the value of the premises: and that depends upon the proper construction of the words of the covenant. The language is *778] no *doubt very loose. Assuming my former construction to be correct, that external means all that is not within the four walls of the house, all the earlier prohibitions would be covered by the words "nor make any external alteration whatsoever." But, after those particular prohibitions, there come these general words,—"nor do any other matter or thing of any nature or kind which may obstruct the view of the river from the White Hart public-house, or that shall grow or be a nuisance or annoyance to the occupier or occupiers thereof." Then comes a prohibition to carry on particular trades; and then follow these words,—"nor raise the roof of the wash-house belonging to the said premises above the present height thereof; nor make any external alterations whatsoever in the said premises, nor any internal alterations in the said dwelling-house that may lessen the value *thereof*, without the consent in writing of the lessor for that purpose." To insure the absolute prohibition of every alteration external to the house, the very strong expression "whatsoever," is used. According to the strict grammatical construction of the sentence, the word thereof in the latter part of the last covenant can only apply to the last antecedent. Upon the best consideration, therefore, that I can bring to the matter, it seems to me that all external alterations are absolutely and entirely prohibited, and that, to make such alterations a breach of the covenant, it is not necessary that they should diminish the value of the premises. As to the waiver, there clearly is no ground for suggesting that what was done by the plaintiff amounted to a waiver.

WILLES, J.—I did not hear the whole of the argument: but, as far as I have been able to form an opinion from what I have heard, I entirely agree with the rest of the court. Rule absolute.

*JONASSOHN *v.* RANSOME and Another. *Feb.* 1. [*779

In an action upon a contract for the supply of a certain quantity of coals during a period of six months, two breaches were assigned,—first, that the defendants refused to take the stipulated quantity of coals,—secondly, that they omitted to pay for those which they had received in the manner provided for by the agreement, viz., by bills at three months from the 1st and 14th of each month.

The defendants having obtained a judge's order allowing them to add two pleas, to the following effect,—"1. *On equitable grounds*, that, during the said six months, a dispute arose between the plaintiff and the defendants, and, after the lapse of the said six months, it was agreed that such dispute should be settled, and that defendants should take as many cargoes as remained untaken, and that plaintiff should allow defendants for any quantity of small coals in such cargoes exceeding six per cent., and *that the agreement in this plea mentioned should be accepted in satisfaction of the said breach of contract*, and that defendants were always ready and willing to perform the said agreement. 2. On equitable grounds, that, after the said cargoes in the second breach mentioned were supplied, and after the breaches, accounts were had and stated, and on such accounting a sum was agreed upon as the sum to be paid to the plaintiff after deducting the sums due from the plaintiff to defendants, and that plaintiff should take bills of exchange for the amounts so agreed upon, and that defendants delivered bills of exchange, and paid the bills so given,"—

The court, on motion, varied the order, by allowing the defendants to plead the first of the two pleas, striking out "*on equitable grounds*,"—and to plead another plea in the same form on equitable grounds, omitting the allegation *as to the acceptance in satisfaction*, and directing that the second plea on equitable grounds should remain,—the plaintiff to be at liberty to reply or demur.

THIS was an action upon a special agreement.

The first count of the declaration stated that the defendants, on the 1st of October, 1855, in consideration that the plaintiff would appoint them sole agents of the plaintiff for the sale of coals at the ports of Aldborough, Woodbridge, Harwich, Manningtree or Mistley, Ipswich, Colchester, and Maldon, and upon all coals the plaintiff might supply to any vessels coming to either of the above-named ports the plaintiff would allow the defendants a commission of 1*s.* 6*d.* per chaldron, and that the plaintiff would supply the defendants with such coals as the defendants required within the then present month of October, at 24*s.* per chaldron, and for such coals as the defendants might require during the six months then next following, that is, from the 1st of November, 1855, to the 30th of April, 1856, and would charge the defendants 24*s.* 6*d.* per chaldron, the coals to be Montague Walls End, shipped in good condition, and the ingrain warranted six per cent.,—the defendants undertook and promised the plaintiff, that, during the said time, they the defendants would take upon an average not *less than two cargoes of coals per [*780
week from the plaintiff, and that they would not bind the plaintiff to supply more than four cargoes per week; and that they the defendants would pay, by their acceptance at three months from the 1st and 14th of each month, for all cargoes shipped at such dates: Averment, that the plaintiff did all things necessary on his part to entitle him to have the promise and agreement performed by the defendants on their part and behalf, and was ready and willing to deliver to the defendants the said coals according to the terms of the agreement: Yet the defendants, not regarding their said promise and agreement, did not nor would take upon an average two cargoes of coals per week from the plaintiff, from the 1st of November, 1855, to the 30th of April, 1856, but wholly omitted, neglected, and refused to do so; whereby and by means whereof the plaintiff lost the sale of a large quantity of coal, to wit, forty cargoes, which he might and would have otherwise sold

and disposed of at a greater profit, and was also deprived, prevented, and hindered from receiving and having of and from the defendants the price and value of the said cargoes of coals, and by means of the said several premises the plaintiff had lost and been deprived of great gains and profits which he otherwise would have had and received, and had been put to great costs, charges, and expenses in raising and getting the coals for the defendants, which coals the defendants had omitted and refused to take and receive, and thereby the plaintiff had lost such costs, charges, and expenses, and the plaintiff had by means of the premises lost the sale of the coals: And for a further breach of the said agreement, the plaintiff averred, that, although he the plaintiff shipped four cargoes of coals according to the terms of the said agreement for the defendants, and although the time for payment for the said four cargoes *781] of coals had elapsed *and passed before the commencement of the suit, and although the plaintiff was ready and willing to accept and take the defendants' said acceptance at three months for the said cargoes of coal, yet the defendants wholly omitted, neglected, and refused to give the plaintiff their acceptance at three months in payment of the said cargoes of coals according to their said agreement.

There were also counts for goods sold, money paid, and money found due on accounts stated.

The defendants pleaded,—first (to the first count), that they did not promise as alleged,—secondly (to the first count), that, after the making the contract and promise in the first count mentioned, and before any breach or non-performance thereof by the defendants, and before the commencement of the suit, it was mutually agreed by and between the plaintiff and the defendants that the said contract and promise should then be, and the same then was, wholly rescinded and abandoned accordingly,—thirdly (to the first breach), that the plaintiff was not ready and willing to deliver to the defendants the said coals according to the terms of the said agreement, as alleged,—fourthly, a traverse of the first breach, —fifthly (to the second breach), that the plaintiff did not ship the said four cargoes of coals, or any part thereof, according to the terms of the said agreement, for the defendants as alleged,—sixthly (to the second breach), that they did from time to time and at all times pay, by their acceptance at three months from the 1st and 14th of each month, for all cargoes of coals shipped at such dates by the plaintiff, according to their said agreement,—seventhly (as to the indebitatus counts), except as to 68*l.* 8*s.* 2*d.*, parcel of the moneys claimed, never indebted,—eighthly, except as in the seventh plea excepted, payment before action, —ninthly, payment into court of 68*l.* 8*s.* 2*d.*

*782] Issue having been joined and taken upon these pleas, *the cause went down for trial at the last Summer Assizes at Durham, the commission day being the 21st of July. On the 22d, the plaintiff's attorney was served with a summons calling upon the plaintiff to show cause why the defendants should not be at liberty to amend by adding the pleas stated in the accompanying abstract. The abstract referred to was as follows:—

"1. Plea *on equitable grounds*,—defendants say, that, during the said six months, a dispute arose between the plaintiff and the defendants, and after the lapse of the said six months it was agreed that such dispute should be settled, and that the defendants should take as many cargoes

as remained untaken, and that plaintiff should allow defendants for any quantity of small coal in such cargoes exceeding six per cent., and *that the agreement in this plea mentioned should be accepted in satisfaction of such breach of contract*, and that defendants were always ready and willing to perform the said agreement.

"2. Second plea on equitable grounds,—defendants say, that, after the said cargoes in the second breach mentioned were supplied, and after the breaches, accounts were had and stated, and on such accounting a sum was agreed upon as the sum to be paid to plaintiff after deducting the sums due from the plaintiff to the defendants, and that plaintiff should take bills of exchange for the amounts so agreed upon, and that defendants delivered bills of exchange, and paid the bills so given."

This summons was attended by counsel before Channell, B., at Durham, when he directed the application to be renewed at the trial. The cause was ultimately made a remanet.

On the 12th of September, a second summons was taken out, calling on the plaintiff to show cause why the defendants should not be at liberty to amend, by adding the pleas before proposed, and also a third to *the effect that the agreement was an agreement for the sale of coals *by measure*, contrary to the statute 5 & 6 W. 4, c. 63. [*783

The learned Baron refused to allow the defendants to plead the last proposed plea, unless they would plead it alone; and ultimately he made an order for the other two pleas to be added, and also a third, increasing the amount of money paid into court. The order, which was dated the 2d of December last, was as follows:—

"Upon hearing counsel on both sides, I do order that the defendants be at liberty to amend the pleas herein, by adding those specified in the abstract or statement annexed, the plaintiff being at liberty, if he shall think fit, to reply and demur to each of the added pleas; that the defendants be at liberty to pay money into court; and, should he do so, the plaintiff may take same out of court in settlement of the action, in which case the plaintiff to be entitled to all costs up to paying the additional money into court. Counsel's fees to be allowed in costs."

Hugh Hill, on a former day in this term, moved for a rule calling upon the defendants to show cause why the above order should not be rescinded or varied. The first of the proposed pleas is clearly a bad one. [WILLIAMS, J.—As a legal plea, it is clearly bad, as being an accord without satisfaction.] It is equally bad as an equitable plea: it is evidently designed to embarrass the plaintiff. An equitable defence under the 17 & 18 Vict. c. 125, s. 83, is admissible only where it sets up matter in respect of which a court of equity would have granted relief unconditionally: Mines Royal Societies *v.* Magnay, 10 Exch. 489;† Steele *v.* Haddock, 10 Exch. 643;† Teede *v.* Johnson, 11 Exch. 840;† Wodehouse *v.* Farebrother, 5 Ellis & B. 277 (E. C. L. R. vol. 85); Wood *v.* The Copper-Miners Company, 17 C. B. 561 (E. C. L. R. vol. 84); Vorley *v.* *Barrett, 1 C. B. N. S. 225 (E. C. L. R. vol. 87); Flight *v.* Gray, antè 320. If the defendants here had [*784 applied to a court of equity for an absolute perpetual injunction, the court would not have granted it without compelling them to perform their agreement. [COCKBURN, C. J.—What is the objection to the second of the proposed pleas?] It sets up no ground of defence in equity: if good at all, it could only be as a legal defence. Then, the

order makes no provision for the costs. [CROWDER, J.—That is a mere accidental omission.]

Manisty, Q. C., and *T. Jones*, now showed cause, submitting that the proposed pleas raised fair and bonâ fide defences, and were such as the defendants ought not to be precluded from putting on the record.

Hugh Hill, Q. C., and *Unthank*, in support of the rule.—The defendants should, as to the first plea, be put to their election to strike out either the words "on equitable grounds," and so make it a plea of accord and satisfaction at law, or to strike out the words "that the agreement in this plea mentioned should be accepted in satisfaction of such breach of contract." [CROWDER, J.—How is the plaintiff prejudiced by the words "on equitable grounds" being left?] If the new agreement was accepted in satisfaction of the breach, there can be no necessity for those words: and, if they remain, it will be said that the accord is no part of the equitable defence, and therefore need not be proved, inasmuch as it is enough to show an executory accord. If the plea is good as a legal plea, the terms of the order allowing the plaintiff to demur are idle: a good legal defence is stated. [WILLES, J.—Is that so clear? Will you undertake not to object in any stage of the proceedings that the plea is not a good legal plea? WILLIAMS, J.—If you undertake that, I agree that the words "on equitable *grounds" *785] are idle.] Why should the defendants be in a better position than they would have been in if this had been pleaded in two pleas,—one as a legal, the other as an equitable defence? [WILLIAMS, J.—That was done in The General Steam-Navigation Company *v.* Rolt.] That undoubtedly would have been the proper course here.

WILLIAMS, J.—I do not see any objection to that. Let the order be varied, by allowing the defendants to plead the first of the two proposed pleas in the form in which it now stands, striking out the words "on equitable grounds," and to plead another plea in the same form on equitable grounds, omitting the allegation as to the acceptance of the new agreement in satisfaction of the breach of contract: the second proposed plea on equitable grounds to remain: the plaintiff being at liberty to reply or demur,—the costs of and occasioned by the amendment, and of the application to the court, to abide the event of the cause.

The rest of the court concurring, Rule accordingly.

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*786] *EDWARDS and Others *v.* THE KILKENNY AND GREAT SOUTHERN AND WESTERN RAILWAY COMPANY. In re ROBERTS. *Jan.* 30.

The affidavits upon a motion for a scire facias against a shareholder in a railway company are properly intituled in the original action.

BREWER, on a former day in this term, obtained a rule calling upon one Roberts to show cause why a writ of scire facias on the judgment obtained by the plaintiffs in this cause should not be issued against him as a shareholder in the company, to enable the plaintiffs to have execution upon the said judgment, to satisfy the plaintiffs in the sum of 3361*l.* 15*s.* 10*d.*, the balance of the debt, and 3*l.* 8*s.* the costs respec-

tively recovered by the said judgment, and still unpaid, to the extent of his (Roberts's) shares in the capital of the company not paid up, pursuant to the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16). The affidavits upon which the motion was founded were intituled "Between Francis Edwards, John Alexander Radcliffe, and Reginald Stevenson Davies, plaintiffs, and The Kilkenny and Great Southern and Western Railway Company, defendants."

Quain, for Roberts, objected, that, inasmuch as this was an application for leave to *commence* an action, the affidavits were improperly intituled in the original action.

CROWDER, J.—It is an application which is made in the course of the original action.

WILLIAMS, J.—The practice always has been to intitule the affidavits as they are intituled here. The scire facias, though in form a fresh action, is *substantially in the nature of a proceeding in the original cause. Rule absolute.(a) [*787

(a) See the next case.

EDWARDS and Others *v.* THE KILKENNY AND GREAT SOUTHERN AND WESTERN RAILWAY COMPANY. In re COLLS. *Jan.* 30.

The affidavits upon a motion for a scire facias against a shareholder in a railway company are properly intituled in the original action.

It is not necessary that the affidavits should *in express terms* state that the judgment remains unsatisfied: it is enough if that fact can be fairly inferred from that which is stated and not contradicted.

And it is no answer to the application, that the works have not been completed within the period limited by the special act, and that therefore the powers granted to the company "for making the railway, *or otherwise in relation thereto*," are at an end.

BREWER, on a former day in this term, obtained a rule similar to that in the last case, upon affidavits similarly intituled, against one Colls. It was sworn that the plaintiffs, on the 18th of December, 1854, recovered final judgment in an action against the company for 4413*l.* 15*s.* 10*d.*, and 3*l.* 8*s.* costs; that 1052*l.* had been received by the plaintiffs since the said judgment was recovered, and that the defendants were justly and truly indebted to the plaintiffs in the sum of 3361*l.* 15*s.* 10*d.* for work and labour as attorneys, and in 3*l.* 8*s.* for costs; that, on the 29th of December, 1854, a writ of fi. fa. was issued, directed to the sheriffs of London, commanding them to levy the amount recovered in the action on the goods and chattels of the defendants, but the sheriffs returned that they had no goods, &c.; and that the defendants had not at the date of the judgment, or at any time since, any lands, chattels, goods, or effects in England or Ireland whereon the plaintiffs could levy the amount of the said judgment, or any part thereof. It was also sworn that Colls was the holder of thirty shares of 20*l.* each, upon which 1*l.* 10*s.* each share had been paid, and that three calls of 10*s.* each were now due thereon, &c.

**T. Jones*, for Colls, objected that the affidavits upon which the rule was obtained did not in terms state that the judgment [*788

remained unsatisfied. [CROWDER, J.—It is sufficiently alleged to call for a contradiction, if the fact were not so.] He then objected that the affidavits were improperly intituled in the original action; whereas this is a new action, and not a proceeding in the old one. [WILLIAMS, J.—There is nothing in that objection.(a)] He then referred to the 29th section of the company's original act of incorporation, 8 & 9 Vict. c. lxxxvii., which enacted "that the railways shall be completed within seven years from the passing of this act, and, on the expiration of such period, the powers by this or the recited acts (b) granted to the company for executing the railway, *or otherwise in relation thereto*, shall cease to be exercised, except as to so much of the railway as shall then be completed."

WILLIAMS, J.—That can hardly be tortured into an excuse for the non-payment by the company of its debts. The rule must be absolute.

The rest of the court concurring, Rule absolute.

(a) See the preceding case.

(b) The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), and the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20).

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*789] *HOLMES v. MACKRELL. *Jan.* 13.

The defendant being called upon by a creditor (the holder of two promissory notes for 510*l.*, more than six months overdue) for a statement of his affairs, made out an account in which the notes were inserted as a debt for which he was liable:—Held, a sufficient acknowledgment within the 9 G. 4, c. 14, s. 8, to take the case out of the statute of limitations.

Held also, that, the whole document being in the handwriting of the defendant, his name written *at the top* was a sufficient signature to bind him.

To take a case out of the statute of limitations, the following endorsement on the back of a promissory note was offered in evidence,—"This note is renewed by the resigning of the parties as under, this 7th of March, 1855:"—*Quære*, whether it was admissible?

THIS was an action against the defendant as one of the makers of two joint and several promissory notes for 250*l.* and 260*l.* respectively; to which the defendant pleaded, amongst other pleas, the statute of limitations.

At the trial, before Cresswell, J., it appeared that the plaintiff was the manager of the Hull Banking Company, and that the defendant had had various pecuniary transactions as well with the bank as with the plaintiff in his personal capacity. The notes in question had originally been given to the bank, but the plaintiff stated that he had subsequently taken them upon himself. The notes were payable on demand: and, in order to take the case out of the statute, the plaintiff in the first instance relied on the following endorsement upon each of them, signed by the defendant and the other parties before the expiration of six years from their date:—"This note is renewed by the re-signing of the parties as under, this 7th of March, 1855."

On the part of the defendant, it was objected that this endorsement was not admissible, on the ground that it amounted to a promissory note or nothing, and was unstamped: and Jones *v.* Ryder, 4 M. & W. 32,† was relied on, where it was held that a promissory note improperly stamped is not admissible as a memorandum to take the case out of the

statute of limitations, under the 9 G. 4, c. 14, s. 8, that section only applying to instruments which might be stamped with an agreement stamp.

Two other documents were then put in, for the same purpose. These were accounts which the defendant had furnished at the plaintiff's request, as showing the *state of his affairs at that time, viz. [*790
March, 1855. The first of these mentioned a promissory note for 510*l.* as outstanding, but it was not signed. The other,—which had no signature at the end, but had "J. Mackrell" at the head of it, and was all in the defendant's handwriting,—had an entry on the debit side of "two notes for 500*l.*," which it was assumed alluded to the two notes declared on.

For the defendant, it was insisted that these were not admissible, the first on the ground of the total absence of signature by the party, and the latter on the ground that the signature was not sufficient within the statute.

A verdict having been, under the direction of the learned judge, entered for the plaintiff for the amount of the notes and interest,

S. Temple, Q. C., pursuant to leave, moved for a rule to enter a nonsuit or a verdict for the defendant.—Jones *v.* Ryder, 4 M. & W. 32,† is a distinct authority to show that the endorsement was not admissible for any purpose. Alderson, B., there says: "The Stamp Act, 31 G. 3, c. 25, s. 19, says, that 'no promissory note shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity, unless the same be duly stamped.' This is clearly a promissory note; it follows that it cannot be received at all: and, if so, there is nothing to take the case out of the statute." [CROWDER, J.—In Matheson *v.* Ross, 2 House of Lords Cases 268, in an action for work and labour, there was tendered in evidence a paper containing a statement of accounts, which declared a balance of 68*l.* 9*s.* 4*d.*, and at the end was an acknowledgment of the payment of that sum: it was offered by the defendant, not for the purpose of proving that the sum of 68*l.* 9*s.* 4*d.* had been paid, for that was not in *contest between [*791
the parties, but in order to show what was the admitted state of accounts at a particular time: and it was held,—reversing an interlocutor of the Court of Session,—that it was admissible for that purpose. Lord Cottenham, C., who goes very fully into the question, says: "Where the document purports to be on the face of it a receipt, and indeed is so, but also purports to be something else, or in cases where debtor and creditor accounts appear set out between the parties, making a certain balance due, and the paper contains a receipt for the supposed balance, whether that balance was paid in money or only settled in account, if the object of the parties is, not to prove the fact of that particular balance having been paid, but merely to show that the parties to the account acknowledged the state of the account to have been such and such at a particular moment, the paper may be produced for this purpose, whether the money has been paid or not. Suppose that the account stood without any receipt or payment, that the balance existed but had not been paid, and the parties had merely agreed to ascertain how the account stood, or was to be rendered, at a particular time, and suppose that the items of the account thus rendered exactly balanced each other, then there would be no payment; for, though there might be the signa-

ture of the parties to the documents, there would be nothing like a receipt, and consequently nothing to require a stamp. That is exactly the present case, except that here we have something added, which purports to be a receipt for the balance. But I cannot find any argument for warranting the conclusion, that, because a paper which purports to be a receipt cannot be used without a stamp, that paper cannot be used for another object, the purport of which is equally apparent on the face of it, and for which no stamp is necessary. I cannot find this conclusion *792] warranted by *any language in the stamp acts or by any authority in the decided cases."(a) That was the case of a receipt stamp. Then, to satisfy the statute, the signature must be at the foot of the document. [CROWDER, J.—Is it the less the signature of the party, because he writes his name at the top of it?] In the case of a will, it is true, the signature under the 29 Car. 2, c. 3, s. 5, might be in any part of it: but, even there, it must have been made with the design of authenticating the instrument.(b) Besides, in the case of a will, the testator has to declare it to be his last will in the presence of witnesses. [WILLIAMS, J.—Unless the statute uses the word "subscribed," or some expression tantamount to it, I do not see why it should not be a signature, wherever placed.] Since the decision of the Exchequer Chamber in Smith v. Thorne, 18 Q. B. 134 (E. C. L. R. vol. 83), it is settled that the same rule as to the construction of acknowledgments since the 9 G. 4, c. 14, prevails as before. Parke, B., there says: "There has been no question since Tanner v. Smart, 6 B. & C. 603 (E. C. L. R. vol. 13), 9 D. & R. 549 (E. C. L. R. vol. 22), that an acknowledgment of a debt must, in order to take it out of the operation of the statute of limitations, be sufficient to support the promise laid in the declaration, viz. to pay on request. By stat. 9 G. 4, c. 14, that acknowledgment must now be in writing; but it must still support a promise to pay on request, either by showing on the face of it an unconditional promise to pay, or by the collateral fact of the performance of the condition, or the occurrence of *793] the event, by which the promise is qualified." *The document in question was not an account stated at all, but a mere statement by the defendant of his affairs, for the purpose of satisfying the bank as to his solvency. [CROWDER, J.—How is it the less an account stated, because it contains something else?] In Rackham v. Marriott, 2 Hurlst. & N. 196,† in answer to an application for payment of a debt, the debtor wrote as follows,—"I do not wish to avail myself of the statute of limitations to refuse payment of the debt. I have not the means of payment, and must crave a continuance of your indulgence. My situation as a clerk does not afford me the means of laying by a shilling; but in time I may reap the benefit of my services in an augmentation of salary that may enable me to propose some satisfactory arrangement. I am much obliged to you for your forbearance,"—and it was held by the Exchequer Chamber,—affirming the judgment of the Court of Exchequer (1 Hurlst. & N. 234†),—that the letter contained no sufficient acknowledgment or promise to take the case out of the statute of limitations. Tanner v.

(a) See Lord Cottenham's remarks upon that case, in the subsequent case of Evans v. Prothero, 2 M'N. & G. 319, where it was held that a receipt not having a proper stamp cannot be used as evidence of a matter collateral to the payment of the money,—as, where it was sought to prove an agreement for purchase, by means of a receipt for the purchase-money.

(b) See Jarman on Wills, Vol. II., p. 66, 2d edit.

Smart and Smith *v.* Thorne were there referred to; and Cockburn, C. J., in giving judgment, says: "An acknowledgment without a promise is not sufficient to take a case out of the statute of limitations. Looking to the current of authorities, and more especially to the last case on the subject, Smith *v.* Thorne, and being of opinion that the principle is applicable to the present case, we think that the acknowledgment must amount to a promise to pay either on request, or at a future period, or on a condition. Here, there is a mere expression of a hope to make some satisfactory arrangement, not an acknowledgment coupled with a promise to pay." Here, the paper was given by the defendant, not as an acknowledgment at all, but merely to satisfy the bank as to his position. [WILLIAMS, J., referred to Sidwell *v.* Mason, 2 Hurlst. & N. 306,† where Bramwell, B., says: "The word 'acknowledgment' is used, not as meaning *something different from 'promise,' but as applicable to actions of debt. That construction was put upon the [*794
word by the court in Smith *v.* Thorne. It is enough, however, if there is an acknowledgment unaccompanied by expressions which control its effect. It is a mistake to suppose, that, because a man expresses a hope to pay when he acknowledges the debt, that therefore the acknowledgment is to be taken as the mere expression of a hope to pay. If a man says 'The bill is due, I hope to be able to pay next month,' that is an acknowledgment; the hope expressed is not inconsistent with a promise to pay immediately. The letter in the present case contains no express promise in words: but a man, in acknowledging that a debt is due, does not ordinarily promise to pay it; and the expression of an intention to pay if the bill is correct, is not inconsistent with the obligation to pay immediately."]

COCKBURN, C. J.—I am of opinion that there should be no rule in this case. It appears that the defendant was called upon by the plaintiff to furnish a statement of his existing liabilities; and that, among his existing liabilities, he stated the two notes declared on as being notes upon which he was then liable. The ordinary legal effect of that acknowledgment is, that it raises a promise on his part to pay the amount. The only question that remains, is, whether there is a sufficient signature. The defendant does not, it is true, put his name at the bottom of the document. But the whole is in his handwriting, and he has affixed his name at the top. I entertain no doubt that that is a sufficient signature for this purpose.

WILLIAMS, J.—I am entirely of the same opinion. This was clearly a sufficient acknowledgment in writing within Lord Tenterden's act, from which a promise to pay may and ought to be implied. As to the objection *to the sufficiency of the signature, the authorities show [*795
that there clearly is nothing in that. In Lobb *v.* Stanley, 5 Q. B. 574 (E. C. L. R. vol. 48), D. & M. 635, on an issue whether the defendant, an uncertificated bankrupt, had given a written promise signed by him after his bankruptcy, so as, under the statute 6 Geo. 4, c. 16, s. 131, to revive a claim barred by the certificate, the following letter was produced, written by him,—"Mr. Stanley begs to inform" the plaintiffs "that he will take an early opportunity of settling their account: but Mr. Stanley objects to give his bill. Mr. Stanley regrets that he has been prevented from answering" the plaintiffs' "letter before. Crescent, Saturday." Evidence of the amount due was given. And it was held that the letter was sufficiently signed. Patteson, J., there

says: "I cannot see why a different construction should be put on stat. 6 G. 4, c. 16, s. 131, from that which is put on *the statute of limitations* and the statute of frauds. The object of all the statutes is merely to authenticate the genuineness of the document: and that is done here as much as if the defendant had said 'I promise,' and had subscribed his full name. It is true that the word 'signed' occurs in the statute: and, if this had been the first time that we were called upon to put a construction on that word, and if the decisions on the statute of frauds had not occurred, I should perhaps be slow to say that this was a signature: but I cannot see how there can be different constructions in the two cases." It was taken for granted both by the bench and at the bar that the same principle of construction applied to the statute of limitations.

CROWDER, J.—I am of the same opinion. As to the first point,—whether the endorsement on the notes was admissible,—it is unnecessary to pronounce any judgment. As to the other, after the decisions upon the statute of frauds and the bankrupt act, I cannot see why the same *796] construction should not be put upon the * statute of limitations. In the case of a note written in the third person, the name at the commencement serves to authenticate the document just as well as a formal signature at the foot of it. If, then, the signature is sufficient, what does the defendant say here? In effect he says,—"I have given two promissory notes for 510*l.*, and I am now liable upon them." That is a plain and deliberate and unconditional acknowledgment of a debt: and it is clear from the case of Tanner *v.* Smart, 6 B. & C. 603 (E. C. L. R. vol. 13), 9 D. & R. 549 (E. C. L. R. vol. 22), and the authorities which have followed it, that, where there is an absolute and unconditional acknowledgment of an existing debt, a promise to pay is to be inferred. It seems to me that the acknowledgment here is one from which a promise to pay must necessarily be inferred.

WILLES, J., was absent. Rule refused.

In a case in the Court of Queen's Bench, more recent than the foregoing, it was held, however, that a petition to the Court of Bankruptcy, under the 7 & 8 Vict. c. 70, signed by an insolvent, in which he states that he is unable to meet his engagements, and, after setting out his debts in a schedule thereof, proposes for the future payment or compromise of his debts to assign all his estate and effects to be applied, so far as they will extend, in full satisfaction thereof, is not an acknowledgment of a debt set out in the schedule, so as to take it out of the Statute of Limitations: Everett *v.* Robertson, 28 L. J. Q. B. 23.

Similar decisions have been made in the United States, which show that the mere including of a debt in the inventory of an insolvent, or its statement in a general assignment for creditors, will not prevent the operation of the statute: Christy *v.* Flemington, 10 Penn. St. 128; Reed *v.* Johnson, 1 Rhode Island 31; Hidden *v.* Cozzens, 2 Id. 401. So in Bell's Estate, 25 Penn. St. 92, it was held that, where an executor sets out in the inventory of the estate a note made by himself to the testator, this is not a sufficient acknowledgment to take the case out of the statute.

These cases are doubtless distinguishable from that in the text, on the ground that in them the admission of the debt was coupled with a declaration express or implied of inability to pay, or was made under a statutory requirement which precluded the inference of a new promise. Yet they serve to show how narrow the distinctions in this branch of the law are.

CATTLIN *v.* KERNOT. *Jan.* 30.

The discharge of a defendant from custody under a ca. sa. operates in law as an absolute satisfaction of the judgment.

The defendant being in execution on a ca. sa. at the suit of the plaintiff, the latter consented to his discharge upon the former withdrawing a notice he had given to dispute a fiat which had issued against him. The defendant afterwards procured the fiat to be superseded. The plaintiff having registered the judgment,—the court made absolute a rule to enter satisfaction on the roll.

THE defendant, in person, on a former day in this term, obtained a rule calling upon the plaintiff to show cause why a memorandum of satisfaction should not be entered as to the judgment signed in this cause on the 21st of January, 1847, for 546*l.* 16*s.* 1*d.* debt, and 5*l.* 14*s.* costs, and registered pursuant to the statute (1 & 2 Vict. c. 110), charging the estate of the defendant,—the debt and costs having been satisfied.

The circumstances out of which the application arose *were as [*797
follows:—Mr. Cattlin in and prior to the year 1846, had acted as solicitor for Mr. Kernot in a suit in Chancery against one Peacock. In 1847, Kernot's bill against Peacock was dismissed by Vice-Chancellor Shadwell. Kernot appealed to the Lord Chancellor, who dismissed his appeal with costs. In the mean time Mr. Cattlin obtained from Kernot a promissory note for 546*l.* 16*s.* 1*d.*, for his bill of costs, and afterwards sued him thereon, and on the 21st of January, 1847, obtained judgment. In the beginning of the year 1848, Kernot being then in prison at the suit of Peacock for the costs of the Chancery proceedings, Mr. Cattlin lodged a detainer against him on his judgment.

Whilst Kernot was so in custody, a fiat in bankruptcy issued against him at the suit of Mr. Cattlin, founded on a debt not included in the judgment. Kernot thereupon applied for and obtained a rule nisi for his discharge from custody, and an arrangement was come to between Mr. Cattlin and Kernot, that, in consideration of the latter withdrawing a notice he had given to dispute the fiat, and allowing the fiat to be gazetted, and an adjudication of bankruptcy to take place, the former would consent to his discharge from custody without incurring the expense of making the rule absolute. And upon these terms Kernot was accordingly discharged from execution as to this suit.

Mr. Cattlin's affidavit in answer stated, that, on Kernot's attorney serving him with the rule nisi for his discharge from custody, he (Cattlin) told him, that, as he must discharge Kernot before he could prove his judgment-debt under the fiat, if Kernot would withdraw all opposition to his bankruptcy, and consent to the same being gazetted, and do nothing directly or indirectly to oppose the same, but permit such bankruptcy to proceed, so that there might be an equal *distribution [*798
of his property, whereby he (Cattlin) should obtain his fair dividend with the rest of the creditors, he would consent to Kernot's immediate discharge; and that thereupon Kernot's attorney procured his signature to the following notice:—

"In the Court of Bankruptcy

"In the matter of C. M. Kernot, of, &c., chemist and druggist, dealer and chapman, against whom a fiat in bankruptcy hath been issued.

"Take notice that the above-named C. M. Kernot withdraws the

notice of his intention to dispute the adjudication in the said fiat, and does not intend to dispute such adjudication, and hereby abandons the notice served on you and each of you on the 26th of January, instant. Dated this 28th January, 1848."

"To T. M. Cattlin, of, &c., and to T. H. Abrahall, Esq., deputy registrar of the said court."

It further appeared, that, upon receiving this notice, Mr. Cattlin signed and delivered to Kernot's attorney an authority for his discharge from custody at his suit; that the fiat was gazetted, an adjudication took place, and Mr. Cattlin proved his debt thereunder; and that afterwards, on the 28th of June, 1848, Kernot caused a petition to be presented to the Court of Review to annul the bankruptcy, whereupon the fiat was ultimately annulled and superseded.

Badeley now showed cause.—The question is, whether the discharge of the defendant under the circumstances operated as a satisfaction of the judgment-debt. In Blumfield's Case, 5 Co. Rep. 86 b, it is distinctly laid down that execution of the body is no satisfaction, but a gage for the debt. The like doctrine is laid down by Lord Hobart in Foster *v.* Jackson, Hob. 52, 59, and by Lord Ellenborough in Taylor *v.* Waters, 5 M. & Selw. 103: and Simpson *v.* Hanley, 1 M. & Selw. 696, *799] and Tanner *v.* Hague, 7 T. R. 420, proceeded upon the same principle. [CROWDER, J.—Do you insist that an absolute and unconditional discharge of a defendant from custody under a ca. sa. is not satisfaction?] Yes. His body or his goods, it may be, cannot be taken under another writ. [CROWDER, J.—Then, what becomes of the debt?] It is enough to say that it is not *satisfied*. [WILLIAMS, J.—In Tanner *v.* Hague, 7 T. R. 420, it was distinctly held, that, if a plaintiff consent to the defendant's being discharged out of execution, on his undertaking to pay at a future day, he cannot afterwards sue out *any* execution on that judgment, in the event of the defendant's not fulfilling his undertaking. And on Vigers *v.* Aldrich, 4 Burr. 2482, Jaques *v.* Whitby, 1 T. R. 557, and Clark *v.* Clement, 6 T. R. 525, being cited, the court said those cases were founded on this ground, "that it was considered that the plaintiff received a satisfaction in law by having his debtor once in custody in execution." On that ground it is, that, if a plaintiff takes one of several joint debtors in execution, and discharges him, he cannot afterwards take the others. If you think the case arguable, by all means proceed.] That the judgment is still for some purposes a subsisting judgment, is clear. In Simpson *v.* Hanley, the defendant was allowed, upon the authority of Peacock *v.* Jeffery, 1 Taunt. 426, to enter satisfaction on the roll upon a judgment obtained against him in the Queen's Bench, on his acknowledging satisfaction for the amount upon a judgment obtained by him in the Common Pleas against the plaintiff for a larger amount, *although he had the plaintiff in custody in execution of that judgment*,—which, it was contended, in law satisfied it. And the Court of Queen's Bench allowed the same thing to be done in this very case; Kernot having obtained a judgment against Mr. Cattlin in an action of trover for some documents which *800] were in his hands. At all events, this *application is answered by the fact of Kernot's discharge having been obtained by means of fraud and trickery: it was obtained upon condition of his withdrawing the notice to dispute the fiat which had issued against him, so that the

fiat might be worked out, and the plaintiff obtain his fair share of the assets. In this respect, the case differs very little from that of Baker *v.* Ridgway, 2 Bingh. 41 (E. C. L. R. vol. 9), 9 J. B. Moore, 114 (E. C. L. R. vol. 17). There, a commission of bankrupt having been sued out against the defendant, in custody under a ca. sa., the plaintiff, in order to prove his debt, discharged the defendant from the execution. The commission having afterwards been superseded, the plaintiff took the defendant in execution again. And the court suspecting from the affidavits that the commission and supersedeas had been fraudulently concerted, refused to discharge the defendant on motion. [CROWDER, J.—In Tanner *v.* Hague, the defendant obtained his discharge upon a condition which he did not perform; and the court held that he could not be taken again.] Here, the defendant was guilty of fraud in procuring the fiat to be superseded, in defiance of his undertaking. [CROWDER, J.—You charge merely a wilful breach of a contract which the party had entered into.] In Ward *v.* Bromhead, 21 Law J., Exch. 216, the plaintiff, having obtained judgment against the defendants, took them in execution under two writs of ca. sa., from which they were afterwards discharged on paying a portion of the debt. The plaintiff afterwards seized the defendant's goods under a fi. fa. for the balance of the debt, which execution was afterwards set aside by the court, on the report of the master that the plaintiff had ratified the discharge of the defendant under the ca. sa. The plaintiff having afterwards brought an action against the defendant upon the original judgment, the court refused, on affidavits of the above facts, to allow satisfaction to be entered on the *roll. [WILLIAMS, J.—Lambert *v.* Parnell, 15 Law J., [*801 Q. B. 55, 10 Jurist 31, except as to the condition, is exactly in point. There, a judgment-debtor, taken in execution, was, after a month's imprisonment, released from prison by the judgment-creditor, who, three years afterwards, registered the judgment pursuant to the 1 & 2 Vict. c. 110, and 2 & 3 Vict. c. 11: and the court made absolute a rule to enter up satisfaction of the judgment, or to strike out the entry on the register, the debtor paying the expenses of whichever alternative he adopted.] The principle of that case is totally different from this: a purchaser may well be entitled to insist upon having an encumbrance removed from the title.

Milward, in support of the rule.—Where the records of the court are improperly made use of for the purpose of perpetuating a judgment which is in law satisfied and discharged, it is matter of right to come to the court and ask to have the entry expunged. That the arrest and discharge of the defendant operated in law a complete satisfaction of the judgment for all purposes, is clear. This was so as long ago as the 21 Jac. 1, c. 24; and the decisions founded upon that statute are uniform. Clark *v.* Clement, 6 T. R. 525, is as strong an authority as can be. It was there held, that, if the plaintiff consent to the discharge of one of several defendants taken on a joint ca. sa., he cannot afterwards retake him, or take any of the others. That case goes the whole length of annihilating the argument on the other side. In Baker *v* Ridgway, Best, C. J., says: "I have looked through all the cases on execution against the person, from the earliest period down to the present time, and I am aware of the great jealousy of the law on the subject of personal restraint. I am aware, that, where a party had

been discharged on account of privilege of parliament, it was doubted whether he could be *retaken after that privilege expired, and *802] the interference of the legislature became necessary to sanction such a proceeding: so, where he died in confinement, it was doubted whether the creditor, having resorted to the highest remedy the law afforded, could have any further means for the recovery of his debt, though the debtor left property behind him: that doubt was also set at rest by the authority of the legislature. I am therefore clear, that, where a commission of bankrupt is sued out against a party in execution, he not being privy thereto, if the plaintiff abandons his execution, and proceeds against the effects of the party by proving his debt under the commission, he has taken his chance, and, though there should be no assets forthcoming, the defendant is secure in his discharge." Even if the discharge was procured by fraud, it would be no answer to the application. But there clearly was no fraud here: at the most, the affidavits of Mr. Cattlin disclose only a breach of a condition subsequent. Lambert v. Parnell, 15 Law J., Q. B. 55, 10 Jurist 31, is a distinct authority to show that it is a matter of right in a case like this to come and ask to have satisfaction entered upon the roll. [WILLIAMS, J.—Except as to the condition, Lambert v. Parnell is precisely in point.]

WILLIAMS, J.(a)—The only doubt that I have entertained in this case, is, whether it is compulsory on the court to enter satisfaction on the judgment roll. It may be taken, upon the affidavits, that Mr. Cattlin consented to the discharge of Mr. Kernot upon an agreement, that, if he would so consent, Mr. Kernot would abstain from controverting the proceedings under the fiat against him; and that, notwithstanding he made the agreement, Mr. Kernot did contest the fiat, and *ulti- *803] mately procured it to be superseded. The question is, whether, under these circumstances, the discharge of Mr. Kernot from custody operated a satisfaction of the judgment-debt. It seems to me to be impossible, upon the authorities, to entertain a doubt. And I think it is impossible to get over the case of Lambert v. Parnell, 15 Law J., Q. B. 55, 10 Jurist 31, where the Court of Queen's Bench ordered satisfaction to be entered in a case precisely like this. There, the plaintiff, after having consented to the defendant's discharge, registered his judgment under the statute: and, according to the report in the Jurist, the court ordered satisfaction to be entered. That undoubtedly is in accordance with all the authorities, and in point here, with this exception, that it does not appear that the discharge was obtained upon a condition which was afterwards broken. The only remaining question is, whether that makes any difference. Upon that I think the authorities also are clear. In Tanner v. Hague, 7 T. R. 420, the defendant was discharged on a condition, viz. on his undertaking to pay at a future day, and it was insisted on the part of the plaintiff, that his discharge under such circumstances was no satisfaction of the judgment: but the Court of Queen's Bench held otherwise. Again, in Blackburn v. Stupart, 2 East 243, it was held that a defendant cannot be taken in execution a second time on the same judgment, though he were discharged the first time by the plaintiff's consent, upon an express understanding that he

(a) Cockburn, C. J., was absent.

should be liable to be taken in execution again if he failed to comply with the terms agreed on. It seems to me, therefore, to be clear, that, unless a case of fraud(*a*) is made out, *the circumstance of the discharge being given upon an agreement which is afterwards broken can make no difference, and that the condition can have no operation against the general rule of law, that, the judgment-debt being once satisfied by the imprisonment of the debtor, it can be no longer used against him for any purpose. Here, there is no fraud in the sense in which that expression is used in a matter of this kind. The non-performance by the defendant of the undertaking he entered into may have been the breach of a condition subsequent, for which, according to Tanner *v.* Hague, the plaintiff may have a remedy against him; but it clearly does not alter the effect of the discharge. This brings us to the question whether or not it is a matter of right for the defendant to come to the court and ask to have satisfaction entered. I find it so treated in Tidd's Practice, Vol. 11, p. 1041. I cannot help thinking that Mr. Cattlin has been somewhat roughly used, in having by the course pursued lost both securities for his debt. Still, in the absence of fraud, the judgment being in law satisfied, I think the defendant is clearly entitled to have satisfaction entered.(*b*) [*804

CROWDER, J.—I also am of opinion that this rule must be made absolute. I have always taken it to be clear law, that, where a creditor has his debtor in execution *under a ca. sa., and then authorizes his discharge, there is an end altogether of the judgment-debt, and the debtor is entitled to have satisfaction entered upon the roll. That this was so where there was no condition and no fraud, does not seem ever to have been doubted. Upon the present occasion; the consent to the defendant's discharge was given subject to something of a condition which it is alleged the defendant failed to perform. I had some doubt at first as to whether that did not make a difference. But the authorities on that are conclusive. Tanner *v.* Hague, 7 T. R. 420, shows that the same principle applies whether the discharge was subject to a condition or not. It is said that here a kind of fraud has been practised upon Mr. Cattlin. I find, upon the affidavits, that it was Mr. Cattlin himself who originally made the proposition.(*c*) Kernot having had a fiat issued against him, Cattlin wished to prove his debt, and accordingly he proposed that, if Kernot would withdraw a notice he had given to dispute the fiat, he would consent to his discharge from custody. That is the arrangement, and the only one which Mr. Cattlin [*805

(*a*) A case occurred some years ago in the Court of Queen's Bench, which does not appear to have found its way into the books. The circumstances were these:—A. (a barrister), being in custody in execution at the suit of B., sent for his creditor, and persuaded him, in the absence of his attorney, to sign an authority for his discharge, upon his promising to pay the debt in a given time; representing to B. that this step would not prejudice his right to take him again if he (A.) failed in the performance of his promise. The debt not being paid,—the court allowed B. to issue a second execution against A., on the ground that his discharge had been procured by fraud. The transaction being afterwards brought before the Benchers of the Inn of which A. was a member, he was disbarred.

(*b*) For this purpose, of course, the roll would have to be carried in. This rule would not per se authorize any interference with the entry in the register of judgments kept by the senior master, which was the ultimate object of the application. That could only be effected (under the authority of a judge's order) where, by operation of this rule, the judgment ceased to be upon the roll of the court as an unsatisfied judgment.

(*c*) This was sworn by the defendant's attorney, but denied by Mr. Cattlin.

sets up. The notice to dispute was withdrawn, and Cattlin's debt proved: and subsequently,—at the instigation, it is said, of Kernot,—the fiat was superseded. It is therefore said, that the ordinary operation of the discharge is prevented by the conduct pursued by the debtor. No authority, however, has been cited to support that proposition. The
*806] case relied on by Mr. **Badeley*,—Baker *v.* Ridgway, 2 Bingh. 41, 9 J. B. Moore, 114,—was one where the release had been procured by fraud. Here, there is no pretence for charging fraud. It seems to me to be perfectly clear that the discharge of the defendant did operate a complete satisfaction of the judgment. That being so, it is clear matter of right to have satisfaction entered upon the roll.

WILLES, J.—I am of the same opinion. There is, it seems, a judgment upon the rolls of the court, which cannot be executed against the defendant, and which ought not to be used against him in any way, because he has once been in custody under a ca. sa. issued upon it, and discharged. I do not at present say what ought to be done if a case of fraud were made out. Fraud generally vitiates every transaction which is based upon it. But here no fraud is established. The only answer attempted to be set up against the defendant's claim to have satisfaction entered, is, that the defendant promised the plaintiff, that, if he would consent to his discharge, he would abstain from doing some act in future. That might give the plaintiff a very good ground of action, if the promise was a legal one, and any damage resulted to him from the breach of it: but it clearly affords no reason why a satisfied judgment should be allowed to appear on the rolls of the court as an unsatisfied judgment. The only effect of permitting it so to remain would be to enable some person to raise an objection to the title to any land the defendant might be desirous of selling, or to enable the executor to treat it as a subsisting judgment. It is clear, that, if the plaintiff had issued a second ca. sa. against the defendant, and taken him under it, his broken promise would have afforded no answer to an application for his discharge: nor do I think that it can afford any answer to the present application. It may be that
*807] an *action will lie against him for the non-performance of the condition upon which his discharge was obtained: but it cannot prevent his right to call upon the court to put an entry on the roll which will prevent his being prejudiced by another entry which has been improperly placed there. Rule absolute.

In the case of Magniac *v.* Thompson, 2 Wallace, Jr. 209, this question was fully discussed, upon an examination of the authorities in England and the United States, and it was there held that where a creditor, having arrested his debtor on a *ca. sa.*, afterwards agreed to set him at liberty on certain terms, it being "expressly acknowledged" by the defendant that it was done "for his accommodation, *without any prejudice* whatever to the plaintiff's rights by the enlargement" as aforesaid, "*or otherwise howsoever*," it nevertheless amounted to an absolute satisfaction and extinguishment of the debt at law, and that equity would not relieve against the effect of the discharge, upon mere general allegations of mistake or fraud.

PLANK and Another *v.* GAVILA. *Jan.* 14.

The defendant, a merchant in Spain, agreed to consign to the plaintiffs, agents in London, all the raisins which should be shipped by him for this country, to sell for him for a certain commission on the "invoice price." In an action to recover the amount of commission on two shipments consigned by the defendant, in breach of his agreement, to third persons,—Held, that it was competent to the plaintiffs to show the proximate value of the consignments upon which they claimed commission, without producing the *invoices*. *Quære*, as to the meaning of "invoice price?"

THE defendant, a merchant in Spain, agreed with the plaintiffs, merchants in London, to consign to them for sale as his agents all the fruit he should ship for this country, for a certain commission upon the amount of the "invoice prices." In an action upon this agreement, the first breach assigned in the declaration was, that the defendant had consigned certain raisins to other persons; the second, non-payment of the commission on sales.

At the trial, before Cresswell, J., at the sittings in London after last Michaelmas Term, it appeared that the defendant had, in breach of his contract, consigned to other merchants in London two parcels of raisins, the one by a vessel called the Symmetry, the other by the Vigilant, in execution of orders received by them. To show the amount of damages they were entitled to on this account, the plaintiffs called one Leask, a broker, who proved that the *value* of these two parcels of fruit was a sum which would have yielded to the plaintiffs for commission 126*l.*

On the part of the defendant, it was insisted, that, *inasmuch as the plaintiffs were by the agreement to receive a commission upon the "invoice price" of the goods, the production of the invoices was necessary to show the measure of damages. [*808

The objection was overruled; and, the jury having found for the plaintiffs, damages 728*l.*, leave was reserved to the defendant to move to reduce them by 126*l.* if the court should be of opinion that the invoices should have been produced.

Honyman now moved accordingly.—It was for the plaintiffs to enable the jury to measure the damages which they were entitled to recover by reason of the breach of the agreement. To do this, the invoices of the raisins by the Symmetry and Vigilant were necessary, and their production was a condition precedent. [WILLES, J.—Why should not the market value be proved by other means?] The commission was not payable on the market value, which means the selling price here, but upon the "invoice price," which is the price charged by the shipper to the consignee. It is as if the contract had stipulated that the plaintiffs should receive such amount of commission as should be fixed by A. B. [COCKBURN, C. J.—The market value must be presumed to be a close approximation to the invoice price. The *amount* does not seem to have been disputed at the trial, but merely the media of proof.] The question is whether the evidence which was laid before the jury really gave them the means they ought to have had for measuring the compensation the plaintiffs were entitled to for the breach of contract.

COCKBURN, C. J.—I am of opinion that there should be no rule in this case. The action is brought for the breach of a contract whereby the defendant engaged to pay the plaintiffs a certain commission on orders for *fruit procured by them for him. It appears that two orders were procured by the plaintiffs, which were executed by [*809

the defendant. There can not be any dispute that the defendant is liable to pay commission upon these orders: but, inasmuch as the agreement says that the commission is to be regulated by the invoice price of the raisins, and the invoices were not produced at the trial, it is contended that the plaintiffs have failed to comply with that which is a condition precedent to their right to damages. If the agreement had stipulated that the plaintiffs should be paid a given amount of commission "upon production of the invoices," that might have been a different thing. But here evidence was given of the value of the shipments; and I think it was open to the jury to draw an inference from that of the amount of the invoice price. It is not denied that *some* commission is due: and it is not contended that the amount found by the jury is excessive. I see no reason, therefore, why their decision should be quarrelled with.

WILLIAMS, J.—I also am of opinion that there should be no rule in this case. No complaint is made here as to the amount of the verdict. If there had been, probably I should have taken a different view of the matter. But what we are asked to do, in effect, is, to reduce the damages to 1*s*. There would be manifest injustice in doing so: the bargain between the parties would not be executed. I agree, that, if, as Mr. *Honyman* suggested, the amount of commission was to be such as A. B. should fix, the plaintiff's title to recover any commission would be dependent on the ascertainment of the amount by the person indicated. But here it is manifest that much more than nominal damages were due. The proper course, I apprehend, would have been, to have told
*810] the jury that the evidence of amount *was unsatisfactory, and that they were at liberty to reduce it. That would be serving the plaintiffs right for presenting their case so imperfectly: but, to say that they are therefore to be punished by having their claim reduced to 1*s*. would be doing them gross injustice.

CROWDER, J.—I also am of opinion that there is no ground for reducing the verdict as prayed. The argument of Mr. *Honyman* proceeds upon the assumption that the production of the invoices was a condition precedent to the plaintiffs' right to recover any commission. That, however, is a fallacy. By the terms of the agreement, the plaintiffs are to have a certain commission upon the invoice price of the shipments. That is a mere description of the mode of regulating or ascertaining the amount of the commission. Evidence was clearly admissible to show what the invoice price was. It was competent to the defendant to contend before the jury that the evidence given was insufficient. But that was not the ground taken. It would be doing the grossest injustice to say that the plaintiffs were only entitled to 1*s*., because they failed to produce the best possible evidence of amount.

WILLES, J.—I am of the same opinion. This application rests upon the ground that the plaintiffs have not given any evidence to entitle them to the commission they claim, or any part of it. By the terms of the contract, they are to receive a certain commission, say 3 per cent. upon the "invoice price." If "invoice price" necessarily meant the amount appearing upon the face of the invoice sent by the defendant, I should probably have thought that Mr. *Honyman's* argument was well founded. But that clearly is not so; for, if invoices were not sent, or they fraudulently represented an amount less than the real value of the

goods, it could *hardly be contended that the plaintiffs would be precluded from recovering any commission, or would be bound to take it upon such diminished amount. It appears to me that the "invoice price" here means the amount at which the goods are invoiced to the purchaser. Now, what was the evidence? That about 100 tons of raisins were sent by the Symmetry and the Vigilant, consigned to two strangers, and that they would fetch in the market here a certain sum. Of course, if the matter proceeded regularly, the amount would appear from the invoices. If the production of the invoices was a condition precedent, the persons who made out the invoices would be the proper persons to call. It seems to me that was not the necessary course. There might be great difficulty in proving the invoices in such a way as to bind the defendant: and it would be throwing an intolerable burthen on the plaintiffs. This very much aids the construction that "invoice price" means the amount which ought to go into an invoice. I think the jury were properly directed to find the invoice price from the evidence of the market value. It is not pretended that 126*l.* represents more than the proper amount of the plaintiffs' commission. [*811

Rule refused.

Where it was agreed that a person in Philadelphia should act as sole agent for a foreign house, and receive orders for goods from them, the goods to be forwarded directly to him, he to receive commissions on sales made by him, and he accordingly procured a number of orders, but the foreign house transmitted the goods so ordered to a house in New York, to be forwarded to the purchasers in Philadelphia; it was held that in an action for a breach of the agreement the jury might give damages beyond the loss of commissions, though no other evidence of injury than such loss was offered: Holler *v.* Weiner, 15 Penn. St. 242.

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*RISBOURG *v.* BRUCKNER and Another. *Jan* 16. [*812

A., acting for B., a foreign principal, but *in his own name*, bought of C., in London, a cargo of wheat on board a certain vessel represented to be on its way from Galatz, payment to be made in cash on delivery of the shipping documents. Having paid the price at the request of his principal, A. drew upon him for the amount, and the bill was duly paid. B. afterwards came to London, *saw the contract, and ratified all that A. had done.* It turned out that the cargo had been fraudulently disposed of by the captain prior to the date of the contract of sale by C. to A.:—Held, that B. could not maintain an action against A. to recover back the money paid, as upon a failure of consideration; but that his only remedy,—whether in his own name or in that of A.,—was against C., the seller.

THE first count of the declaration stated that the defendants theretofore, and before the commencement of the suit, wrongfully intending and contriving to deceive the plaintiff in that behalf, falsely and fraudulently represented to the plaintiff that a certain vessel called the Gesina Bertha, then alleged to be on a certain voyage, to wit, from Galatz to the United Kingdom, had before the time of making the said representation, and before the purchase of wheat by the plaintiff thereinafter mentioned, passed a certain place called Constantinople, in Turkey, in parts beyond seas, on the said voyage, and by such false and fraudulent

representation induced and procured the plaintiff to purchase, and the plaintiff, relying upon the said representation of the defendants, did purchase, a certain cargo of wheat alleged to be loaded upon the said vessel so as aforesaid represented to have passed the said place on the said voyage, for a large sum of money which the plaintiff then paid for the said wheat; whereas in truth and in fact the said vessel had not at the time of the making of the said representation by the defendants, or at the time of the said purchase, passed the said place called Constantinople aforesaid on the said voyage, as the defendants at the time of making the said representation and at all times thenceforth well knew; and by reason of such false and fraudulent representation of the defendants the plaintiff wholly lost and was deprived of the said sum so paid for the said wheat, and the gains and profits that he would otherwise have derived, and ought to have derived, from the said purchase, and was otherwise greatly injured and damnified.

There was also a count for money paid, money received, and money found due on accounts stated.

*813] *The defendants pleaded, to the first count, not guilty, and as to the residue of the declaration, never indebted.

The cause was tried before Cockburn, C. J., at the sittings in London after last Trinity Term, when the facts which appeared in evidence were as follows:—The plaintiff was a merchant residing in the north of France. The defendants were commission merchants in London. In December, 1853, the defendants having a cargo of wheat from Galatz to dispose of, wrote to the plaintiff as follows:—

"London, 2d December, 1853.

"Herewith we send you sample of a small cargo (620 qrs.) new wheat from Galatz, per Gesina Bertha. We had this cargo firm in hand to-day for sale to the continent at 67*s*. If you can offer us that price, freight and insurance (done in London) to Dunkirk included, we hope to be able still to succeed on receipt of your answer: and, if there be a chance of buying at a fraction lower than that, you can rest assured we shall be glad to study economy in your interest, which in that case would be ours. Our commission would be 2 per cent. on the gross amount, as usual; for, we presume, we shall have to draw on bankers in Paris or Antwerp. If, however, you prefer paying us the amount of invoice here in London against bill of lading, we will only charge 1 per cent. commission. Cash payments are customary here for all floating cargoes. The wheat, per Gesina Bertha, has been shipped at the weight of 61½ to 62 lbs., say 77/78 kilos. to the hectolitre. The shippers are very respectable; and we lately sold one of their cargoes at 68*s*. for Antwerp. The vessel having left Galatz the 12th October, and *having passed Constantinople*, may be expected on the English coast within a month."

Having received instructions from the plaintiff to make the purchase for him on the best terms they could, the defendants wrote again on the

*814] 6th, stating that they *had purchased at 66*s*. The contract between the defendants and the sellers was as follows:—

"London, 6th December, 1853.

"Sold Messrs. Brückner & Co. the cargo of fine Galatz wheat, quality equal to the sealed sample in their possession, due allowance to be made for brandling, when shipped at Galatz in good and merchantable condition, per Gesina Bertha, Wever, master, and consisting of 450 kilos, as

per bill of lading dated 13th October, N. S., at the price of 66*s.* (say sixty-six shillings) per quarter free on board at Galatz, and including freight and policies of insurance to any safe port in the United Kingdom or continent between Havre and Hamburg, both these ports included; the vessel calling at either Cork or Falmouth for orders. Computation of measures, 100 kilos. equal to 143 quarters. No charge for dunnage. Payment, cash, in exchange for shipping documents, deducting interest for the unexpired time of three months from date of bill of lading, at the rate of 5 per cent per annum; the same to be taken up on or before the 13th instant. Sellers to hand buyers policies of insurance effected with approved underwriters in London, but for whose solvency sellers are not responsible. Sellers pay buyers a commission of 1 per cent. on the gross amount of invoices.

(Signed) "BARKER & BLACK."

The invoice delivered by Barker & Black treated the transaction as a sale to Brückner & Co., and the amount, less 1 per cent. commission, being 1757*l.* 9*s.* 10*d.*, was paid in cash by Brückner & Co. to Barker & Black; and Brückner & Co. drew upon the plaintiff at two months for the invoice amount and their commission and brokerage, amounting to 1833*l.* 9*s.* The invoice sent by the defendants to the plaintiff was headed as follows:—"Invoice of a cargo of Galatz wheat afloat, per Gesina Bertha, Captain R. F. Wever, bought by order and for account of M. Risbourg, at Bouchain."

*On the 18th of January, 1854, intelligence reached London, that, prior to the 6th of December, 1853, the cargo of the Gesina [*815 Bertha had been discharged and sold at Constantinople, and that the proceeds (300*l.*) were held by the Dutch Consul at that place on behalf of the shippers.

The plaintiff having paid the bills (and Barker & Black having failed), sought to recover back the amount from the defendants, on the ground that, having made the contract in their own names with Barker & Black, they thereby precluded him from having recourse to Barker & Black for the return of the money received as the price of a non-existing cargo. The case of Couturier *v.* Hastie, 5 House of Lords Cases 673, was referred to.

The first count of the declaration was abandoned; it being admitted that the defendants, in representing the vessel and cargo to have passed Constantinople, acted bonâ fide, and spoke according to their belief. The following admissions were made between the counsel, and it was agreed that the question of the defendants' liability should be referred to the court:—"*That the defendants entered into and executed the contract of sale as the agents of and on behalf of the plaintiff*, but executed the contract in their own names, without disclosing in it the name of any principal, or that they were acting for any principal, though they verbally informed the sellers' brokers that they were buying for a foreign purchaser: that, at the time the contract of sale was entered into, the cargo had ceased to exist, but the defendants acted bonâ fide in making the contract. The admission that the defendants bought as the agents of the plaintiff is not to preclude the plaintiff from contending that the defendants, in executing this contract, departed from the authority conferred by the correspondence, and are therefore liable to the plaintiff, if in this form of action any such point should be open to the plaintiff."

*816] *It was further admitted by the counsel for the plaintiff, that *the plaintiff, having come to England in March, saw the contract, and ratified all that the defendants had done.* But he insisted that the defendants had no authority to buy in their own names, nor to buy for cash, nor to stipulate for commission: with reference, however, to the last point, he admitted that it was the usage of the London corn trade, that the broker of a foreign buyer may receive a commission from the seller, and that the taking such commission in this case was bonâ fide, and that the commission had nothing to do with the price.

A verdict having been taken for the defendants,

Bovill, Q. C., in Michaelmas Term last, pursuant to leave, obtained a rule nisi to enter a verdict for the plaintiff for 1796*l.* 9*s.*, with interest at the rate of 5*l.* per cent. per annum from the 10th of February, 1854, "on the ground that the defendants were liable to return the money paid for the cargo, and that the plaintiff was not bound to resort to Barker & Black."

J. Wilde, Q. C., *Honyman*, and *Yorke*, now showed cause.—The ground upon which the plaintiff seeks to recover back the money paid for the cargo in question, is, that the contract being for the sale of a specific cargo, and the subject-matter of the contract having no existence at the time, the money was paid without consideration. The case of Couturier *v.* Hastie is distinguishable on this ground, that there the captain had sold the cargo under circumstances which rendered the sale justifiable, and the purchaser had a good title; whereas, here, the sale was improper and fraudulent on the part of the captain. Assuming, however, that the cargo did not exist at the time of the contract, and that, according to the authority of Couturier *v.* Hastie, *the plaintiff is entitled to recover back the money from somebody, the question is whether he can recover it from the defendants. In the first place, it is admitted that the defendants made the contract as agents for the plaintiff. As between themselves and the plaintiff, they were agents throughout; and they did not cease to be his agents because they had so conducted themselves as to become liable as principals to the parties with whom they contracted. Besides, with full knowledge of all that had been done, the plaintiff, after the payment of the money, ratified the defendants' acts.

*817]

The court called on

Bovill, Q. C., and *J. Kay*, to support the rule.—It is clear, according to the case of Couturier *v.* Hastie, 5 House of Lords Cases, 673, that, where the subject of the sale is non-existing at the time the contract is entered into, the purchaser is entitled to recover back the money he has paid upon the faith of there being an existing something to be sold and bought, and capable of transfer. [COCKBURN, C. J.—Assume that this was a non-existing cargo.] In that case the plaintiff would clearly be entitled to recover back his money from some one. The question is, from whom? It is said that he is bound to have recourse to Barker & Black. That raises another question,—who was interested in the cargo? The defendants purchased in their own names, the contract not disclosing the fact that they purchased as agents. [COCKBURN, C. J.—That does not prevent the principal from adopting the contract as his own. In Smith's Mercantile Law, 5th edit., by Dowdeswell, 162, it is laid down, that, "if an agent acting for an undisclosed principal have made a contract *in his own name*, the principal may sue upon

it."] In Pennell *v.* Alexander, 3 Ellis & B. 283 (E. C. L. R. vol. 77), the defendants, merchants resident in Ireland, wrote to S. A., a merchant resident in London, authorizing him *"to take for us two cargoes" of Ibraila corn, 1000 to 1500 quarters, at 24*s.* to 24*s.* [*818 3*d.*, "payment by our acceptance at two or three months," and in a postscript added, "You may go to 24*s.* 6*d.*, if you find you cannot do the work at 24*s.* or 24*s.* 3*d.*" S. A. made a bargain with R., a merchant resident in London, for a cargo by the C., and sent him a note commencing "Sold by order and for account of R. to our principals the cargo" of Bulgarian corn per C., at 24*s.* 6*d.* per quarter, cost, freight, and insurance; "Sellers to pay a commission of 2 per cent. Payment in cash" in one week after receipt of documents. On the same day, R. in his books debited S. A. with the price of the cargo, and sent S. A. the shipping documents with the bill of lading endorsed, and an invoice headed "S. A. bought of R." On the same day, S. A. wrote to defendants "to advise having purchased for your account the cargo of Bulgarian corn per C., at 24*s.* 9*d.* per quarter, C. F. & I. (cost, freight, and insurance), which is 3*d.* per quarter over your limit for Ibraila, but proportionately cheaper." In this letter were enclosed the shipping documents of the C. (including the endorsed bill of lading), and an invoice headed "Invoice of a cargo, &c., bought by order and for account and risk" of defendants, and a draft for the price at 24*s.* 9*d.*, drawn by S. A. on the defendants. The defendants returned the draft accepted, stating in the letter, "We note purchase of corn per C. at 24*s.* 9*d.* We would much rather have had Ibraila at 24*s.* or 24*s.* 3*d.*" After this, whilst the bill was still current, and before the arrival of the C., S. A. failed. R. stopped the cargo of the C., treating S. A. as the purchaser, and claiming to be an unpaid vendor to him. The defendants, on receiving an indemnity from R. against the bill, paid him the price, less discount, at the rate of 24*s.* 6*d.*, being less than the sum for which the bill was accepted, which was at the rate of 24*s.* 9*d.* The assignees of S. A., who *had become bankrupt, sued the defendants on the bill. R. defended the action for them, on the [*819 ground that the consideration for the bill had failed. A case was stated for the Court of Queen's Bench, in which the correspondence, containing as above stated, was set out, and the court had power to draw inferences of fact: and it was held, that, on the above documents, it must be taken, that, notwithstanding the form of the contract note and the defendants' order to S. A., the transaction was a sale from R. to S. A., and a sale from S. A. to the defendants, and not a sale from R. to the defendants through S. A.: and this without reference to the fact of the defendant's residence in Ireland. [WILLES, J.—That is an exceptional case. Ashlin could not say he acted as agent of Alexander & Co., for, he bought at 24*s.* 6*d.*, and returned 24*s.* 9*d.* If he had been their agent in buying the corn, Alexander & Co.'s payment to Ralli and Co. would have been an answer to the action by Ashlin's assignees.] That the agent is to be considered as the seller of the goods to the foreign correspondent is not a new doctrine: Feize *v.* Wray, 3 East 93; Schuster *v.* M'Kellar, 26 Law J., Q. B. 281. In Jones *v.* Littledale, 6 Ad. & E. 486 (E. C. L. R. vol. 33), 1 N. & P. 677 (E. C. L. R. vol. 36), L. & Co., brokers at Liverpool, sold hemp by auction at their rooms, and gave an invoice

describing the goods as "bought of L. & Co.," and received part of the price, but failed to deliver the goods. An action being brought against them by the purchaser for the non-delivery, and for money had and received, it was held that L. & Co. had made themselves responsible as sellers by the invoice, and could not defend themselves by evidence tending to show that they sold as agents, and had intimated that fact before and at the time of the sale, and that, the principals being indebted to L. & Co., the invoice had been made out in their names, according to a custom of brokers in Liverpool, to secure the passing of
*820] the purchase-money *through their hands. Lord Denman there says: "It is clear, that, if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility." That was followed by Higgins v. Senior, 8 M. & W. 834,† and other cases. In Smyth v. Anderson, 7 C. B. 21, 33 (E. C. L. R. vol. 62), Maule, J., on the authority of Thomson v. Davenport, 9 B. & C. 78 (E. C. L. R. vol. 17), 4 M. & R. 110, 2 Smith's Leading Cases (4th edit.), 286, says: "It is well known, in ordinary cases, where a merchant resident abroad buys goods here through an agent, the seller contracts with the agent, and there is no contract or privity between him and the foreign principal." And that is followed by Green v. Kopké, 18 C. B. 549 (E. C. L. R. vol. 86), where Dr. Story's suggestion is controverted by the court, and Chancellor Kent's adopted. [WILLIAMS, J.—Do you mean to contend, that, if the money had not been paid here, the vendors could not have sued the present plaintiff?] Yes. A merchant, though in one sense agent for his foreign correspondents, is not by mercantile usage entitled to pledge their credit, as purchasers, for what he buys in the home market on their account: Poirier v. Morris, 2 Ellis & B. 89. Crompton, J., during the argument of that case, says,—"There are very many mercantile cases in which a person is employed as agent to buy, but without any authority to pledge his principal's credit. In the ordinary case of a Liverpool merchant purchasing cotton at New Orleans, the constant custom is, to write to his correspondents there to buy cotton for him on commission. The New Orleans house buy as the Liverpool merchant's agents: they charge him the cost price, and a commission for buying the cotton for him: but they cannot pledge his credit for the cotton: they must buy it on their own credit, or pay for it out of their
*821] own funds." In the case of a foreign principal, to make *him responsible to the sellers, there must be an express authority in the agent to pledge his credit. Here, the plaintiff never knew who the sellers were, until after the completion of the transaction. [COCKBURN, C. J.—The general rule of law undoubtedly is, that an undisclosed principal may sue upon a contract made by an agent. But it is said that rule does not apply where the principal is a foreigner.] The contract was made by Brückner & Co. as principals. The plaintiff's remedy cannot be against Barker & Black: for, the sum he paid was 1833*l.* 9*s.*, whereas the amount which they received was only 1757*l.* 9*s.* 10*d.*

COCKBURN, C. J.—This appears to me to be so clear a case that I almost doubt the propriety of the course I adopted at the trial, in reserving the plaintiff leave to move. The facts are simple. The plaintiff employed the defendants as his agents to purchase a cargo of corn for him.

They bought of Barker & Black; but, though they informed Barker & Black that they were buying for a foreign principal, they did not disclose his name, and they made the contract in their own names. It was afterwards discovered that the cargo had, previously to the date of the contract, been fraudulently disposed of by the captain at Constantinople, in order to enable him to obtain a more advantageous freight. The defendants had paid the price of the cargo to Barker & Black, and had drawn for the amount upon the plaintiff; and the latter, having paid the bills, now seeks to recover back the money from the defendants, his agents. It is of every day occurrence that persons acting as brokers or agents make contracts in their own names, without disclosing the names of the persons for whom they are acting. It is said that the plaintiff in this case cannot have recourse to the sellers of the cargo to recover back the price paid in respect of a consideration which has *wholly failed. But, in [*822 the first place, that is contrary to the established rule of law, that, where an agent makes a contract for a principal, though his name is not disclosed, the principal may, if he thinks proper, enforce it against the other contracting party. It is true, that, here, the principal is a foreigner, and that there is another rule of law, equally indisputable, that, where a man contracts as agent for a foreign principal, the contract is considered as having been entered into with the agent. It may be doubtful how far that rule applies where the foreign principal is seeking to enforce the contract.(*a*) But, be that as it may, it would have been the same if the defendants had made the contract in the name of the foreign principal. I do not think that part of the argument touches at all the gist of the case. The question is, whether the defendants had the authority of the plaintiff for entering into the contract. It is clear from the correspondence that they had; and it is admitted, that, after the contract had been entered into, the plaintiff ratified all the defendants had done. The contract was entered into by them with Barker & Black as agents, and the money was paid by them in discharge of their principal's liability; and the principal was bound to repay them. Having paid the money, he cannot be permitted now to turn round upon his agents, and say that they are bound to return the money, because they made the contract in their own names. The defendants are clearly entitled to retain their verdict.

WILLIAMS, J.—I am entirely of the same opinion. The defendants, acting as agents for the plaintiff, buy of Barker & Black a cargo of wheat, contracting with them in their own names, and without disclosing the name of their principal; and they pay for it, and are *reimbursed [*823 by their principal. Barker & Black never deliver the wheat, so that there is a total failure of consideration for the payment. The question is, to whom is the principal to resort to recover back his money,—the persons who received it, or the agents? I am clearly of opinion that his only remedy is against the former; and that it makes no difference, that, by the form of the contract into which they entered, the agents had made themselves personally liable to the sellers in the first instance. If we were to hold the contrary, we should be altogether changing the character of agents, who have a right to look to their principals for indemnity, and making them a sort of intermediate contractor, buying from the one party and selling to the other on their own account.

(*a*) See Peterson *v.* Ayre, 13 C. B. 353 (E. C. L. R. vol. 73), and the cases there cited.

CROWDER, J.—I also think the plaintiff has failed to make out any right to maintain this action. The price of the cargo in question was paid by the defendants as agents for the plaintiff and by his express desire, and in discharge of his liability; and now he seeks to recover it back from them on the ground that he gave them no authority to buy in their own names. It is admitted that the defendants were employed by the plaintiff to make the purchase as his agents, that they made the purchase informing him that they had done so, and that the principal afterwards came to England, and, having seen the contract, ratified all that the defendants had done. What possible ground of complaint, therefore, can the plaintiff have against the defendants for doing that which, if not previously authorized by him, was afterwards ratified by him? It was at one time a question whether, the contract being for cash on delivery of the shipping documents, the plaintiff should furnish the defendants with the money or give them bills: and he elected the
*824] latter course. The payment, *therefore, was made at his express request. I cannot see any pretence for calling upon them to refund the money. It is said that the plaintiff could not, upon the failure of the consideration, sue Barker & Black. I must confess I do not see why not. One ground alleged is, that the principal's name being undisclosed, and he being a foreigner, there is no privity between him and Barker & Black. It may be that the contract is entered into with the agents only: but that is a question of fact. In Heald *v.* Kenworthy, 10 Exch. 739, 743;† Parke, B., says: "Where the seller deals with an agent resident in this country, and acting for a foreign principal, the presumption is that the seller does not contract with the foreigner and trust him, but with the party with whom he makes the bargain. *That is a question of fact, and not of law.*" It seems to me that the question does not arise here. We must take this as the ordinary case of a principal authorizing an agent to make a payment for him. The money having been paid in pursuance of the authority, and the agent having been reimbursed by his principal, the latter cannot recover it back.

WILLES, J.—I am of the same opinion. It appears to have been assumed in the argument on the part of the plaintiff, that, when once it was made out that Risbourg would not have been liable on the contract to Barker & Black, it would follow that the transaction between the plaintiff and the defendants would cease to be a transaction as between principal and agent. That is clearly a mistake. Suppose,—though I am clearly of the contrary opinion,—the contract for the sale of the cargo of the Gesina Bertha was only binding as between the defendants and Barker & Black, it would have made no difference: the plaintiff, as principal, would still have been bound to indemnify the defendants from the
*825] consequences that might result *from the bargain, and would have to bear the loss, if any loss happened. It appears, that, through the fraud or misconduct of the captain, the cargo had been sold at Constantinople before the 6th of December, and consequently the subject-matter of the contract no longer existed. But the price had been paid by the defendants to Barker & Black in discharge of a liability which they had incurred at Risbourg's request. The defendants might have maintained an action against him for the money so paid: and it is impossible that Risbourg could have any right of action against them because he had fulfilled his contract of indemnity. It may be that the money could only be recovered back from Barker & Black in the names

of the defendants: but any inconvenience that might arise from that would be brought upon the plaintiff by his own act. Upon the state of circumstances here appearing, the contract being one in which the ordinary relation of principal and agent subsisted, the ordinary rule must be applied that he who would derive the profit, if profit were made, must bear the loss, if loss is sustained. The rule must be discharged.

Rule discharged.

*HOLLAND *v.* JUDD. *Jan.* 27. [*826

A cause in which the defendant had pleaded never indebted, the statute of limitations, payment, set-off, and accord and satisfaction, was referred to a county court judge under the compulsory clauses of the Common Law Procedure Act, 1854; the costs of the cause to abide the event of the cause, and the costs of the reference to be in the discretion of the arbitrator. The county court judge having certified "that the defendant was not at the time of the commencement of the action indebted to the plaintiff," and having found a general verdict for the defendant, and directed that the plaintiff should pay the costs of the reference,—the court sent the certificate back to be amended by stating the manner in which the several issues were found.

THIS was an action for the hire of horses, carriages, and other vehicles by the plaintiff let to hire to the defendant; with a count for goods sold and delivered, and the usual money counts.

The defendant pleaded,—first, never indebted,—secondly, the statute of limitations,—thirdly, payment,—fourthly, set-off,—fifthly, accord and satisfaction.

The cause was by a judge's order under the compulsory clauses of the Common Law Procedure Act, 1854, referred to the judge of the county court of Warwickshire holden at Birmingham,—the costs of the cause to abide the event of the cause, and the costs of the reference to be in the discretion of the arbitrator.

After hearing the parties, the county court judge, on the 9th of December last, gave the following certificate:—"I do hereby certify that the said defendant was not at the time of the commencement of this action indebted to the plaintiff. I find a verdict for the said defendant, and I direct that the costs of the said reference shall be paid and borne by the plaintiff."

Honyman, on a former day in this term, moved to set aside the certificate, on the ground that it did not decide the issues. He referred to Bourke *v.* Lloyd, 2 Dowl. N. S. 452, where it was held, that, where a cause is referred to arbitration, and *the costs of the cause* are to abide the event of the award, the arbitrator must find specifically upon each issue. He submitted that the court might probably think it right to send the matter back to the county court judge under the 8th section. [CROWDER, J.—Does that section apply to these compulsory references?] The words are general.

*The rule was granted in the alternative,—to show cause why [*827 the certificate should not be set aside, on the ground that it was not final, and that the judge had not decided the various issues joined in the cause, so as to enable the master to tax the costs thereof,—unless the defendant would consent to the certificate being referred back to the county court judge for reconsideration and amendment.

Bittlestone showed cause.—Substantially, the judge has found all the issues for the defendant. There is no inconsistency. [COCKBURN, C.

J.—Is there no inconsistency in saying, "I never owed you 5*l.*," and "I paid you the money"?] In Cooper *v.* Langdon, 9 M. & W. 60, 65,† Parke, B. said: "The arbitrator directs a general verdict to be entered for the defendant. Then comes the question whether the issues may not all consistently be found for the defendant. I have no doubt they may. Suppose the plaintiff to fail in proving the agreement, as, for instance, for want of a stamp, and that the defendant were to prove the other issues, there would be no inconsistency in finding them all for him." That was confirmed by Humphreys *v.* Pearce, 7 Exch. 696,† where it was held, that, where matters in difference in a cause involving several issues are referred to arbitration, the costs of the cause to abide the event, the award is good notwithstanding there is no specific finding on each issue, if it appear by necessary intendment that the arbitrator has disposed of
*828] all the issues.(*a*) *[COCKBURN, C. J.—Independently of the finding of the arbitrator, how would the issues have been entered at Nisi Prius?] Substantially, all for the defendant.

Honyman, in support of his rule, was stopped by the court.

COCKBURN, C. J.—The matter must go back to the arbitrator to be reconsidered. He has clearly made a mistake; but it might have been set right without the expense of coming here. He must state in his certificate how he disposes of the several issues. But there must be no costs.

Rule absolute, to refer back the certificate to the county court judge for reconsideration and amendment as to the manner in which the several issues were found, each party to pay his own costs of and occasioned by this application.

(*a*) In that case, the pleas were,—first, except as to 42*l.*, never indebted,—secondly, except as to 42*l.*, a set-off,—thirdly, except as to 42*l.*, payment,—fourthly, as to 42*l.*, payment of 42*l.* 1*s.* into court. The arbitrator awarded as follows:—"I do award and order that the said J. Pearce (the defendant) shall and do pay or cause to be paid to the said R. Humphreys the sum of 84*l.* 14*s.* 2*d.* over and above the sum of 42*l.* paid into court by the said J. Pearce, which I do adjudge and award to be due from the said J. Pearce to the said R. Humphreys for and upon the matters in difference to me referred." And Parke, B., said: "In this case, by necessary intendment there is a finding upon every issue; for, the arbitrator awards that 84*l.* 14*s.* 2*d.* is due in respect of the matters referred, over and above the 42*l.* paid into court. That disposes of the issues on the pleas of payment and set-off; for, if the defendant had proved a set-off and payment beyond the 42*l.*, the arbitrator could not have found that 84*l.* 14*s.* 2*d.* was due. The set-off is only material as a matter in difference in the cause: and the question whether the defendant had a set-off will depend upon the sum which is awarded to the plaintiffs: therefore, the arbitrator must have found both the pleas in the negative, for otherwise the plaintiffs could not be entitled to 84*l.* 14*s.* 2*d.* beyond the sum paid into court."

*829] *SMITH *v.* HARNOR. *Jan.* 16.

A. sued B. for an assault, with a count for slander, and obtained a verdict on the first count for 5*l.*, but failed to establish a cause of action on the second count:—Held, that he was entitled to no costs.

Semble, that a question as to the taxation of costs will not in general be entertained at Chambers.

THE first count of the declaration charged the defendant with having assaulted the plaintiff, the second was for slander.

At the trial the plaintiff obtained a verdict upon the first count, with 5*l.* damages; but he failed on the second count, proving mere terms of abuse, such as thief, swindler, &c.

Needham moved that the master (who had declined to do so) might be directed to tax and allow to the plaintiff his ordinary costs. [CROWDER, J.—Have you been to Chambers?] No. [WILLES, J.—I invariably decline to go into a question of taxation at Chambers.] The master conceived that the plaintiff was precluded from recovering any costs by the 11th section of the County Court Act, 13 & 14 Vict. c. 61, he having obtained a verdict for 5*l.* only, and there being no certificate under s. 12, or judge's order under s. 13.(*a*) The 11th section, however, it is submitted, applies only where the action is brought for that in respect of which the verdict is obtained, and that only; and does not apply where it is bonâ fide brought for something else besides. [CROWDER, J.—See what absurdity that would lead to. If a plaintiff sues for slander, and fails, he pays costs; if he brings an action for an assault, and obtains no more than 5*l.* damages, he gets no costs: but, according to your view, if he brought his action for the two, and altogether failed as to the one, and obtained less than 5*l.* damages on the other, he would be entitled to the costs of the cause!] The plaintiff is enabled by the 41st section of the Common Law Procedure Act, 1852, to join the two causes of action.

*COCKBURN, C. J.—The case is too clear for argument. There will be no rule. [*830

WILLIAMS, J.—This is not the less an action of trespass in which the plaintiff has failed to obtain damages exceeding 5*l.* because an unfounded charge of slander is attached to it.

The rest of the court concurring, Rule refused.

(*a*) See 15 & 16 Vict. c. 54, s. 4, and 19 & 20 Vict. c. 108, s. 30.

MOOR *v.* ROBERTS and Another. *Jan.* 12.

In consideration that the plaintiff would advance 1200*l.* to a third person upon mortgage of certain leasehold premises, the defendants promised, that, if, after any *sale* of the said premises duly made under the power of sale to be contained in the mortgage-deed, the purchase-money should not be sufficient to satisfy the principal sum and all interest, costs, charges, and expenses which might be then due in respect of the mortgage, they would immediately thereafter make good and pay to the plaintiff such deficiency, whether the same should be occasioned by any defect in the title to the premises or otherwise howsoever.

The premises having been put up to auction under the power of sale, were knocked down to one W. for 650*l.*, and W. paid a deposit of 100*l.* and signed the usual contract: but he afterwards declined to complete the purchase, on the ground of the vendor's inability to produce certain receipts for ground-rent; and the plaintiff brought an action against him to recover damages for his alleged breach of contract, which action was still pending:—

Held, that, under these circumstances, a concurrent action against the defendants upon their guarantee was premature,—the word "sale" in that instrument meaning a sale *completed*, so that the deficiency which was to be made good by the defendants could be ascertained.

A verdict was found for the plaintiff at the sittings after Trinity Term, 1857: in Michaelmas Term, a rule nisi was obtained to enter *a verdict for the defendants*: this rule was made absolute to enter *a nonsuit*, in Hilary Term, 1858:—The plaintiff having died on the 14th of December, 1857, the court allowed judgment to be entered nunc pro tunc as of Michaelmas Term.

No will of the deceased having been proved, nor any letters of administration granted, the rule was drawn up calling upon the legal representatives (if any), upon notice of the rule to be given to them or to the attorney in the cause of the late plaintiff.

THIS was an action upon a guarantee. The declaration stated that one William Kirby was desirous of borrowing the sum of 1200*l.* upon

mortgage of certain land, with the houses, messuages, and buildings thereon erected, and known as numbers 12, 13, 14, and 15, Russell Terrace, Holland Road, in the county of Surrey, and it was proposed and intended that interest should be payable on the said principal sum of 1200*l.*, at the rate of, to wit, 5*l.* per cent. per annum, and that the mort-
*831] gage-deed to be executed should express that such *interest should be payable, and should also contain all necessary and usual powers of sale upon default: That thereupon, in consideration that the plaintiff and one George Mallows, since deceased, at the request of the defendants, would advance to the said William Kirby the said sum of 1200*l.* upon such mortgage as aforesaid, the defendants undertook and promised the plaintiff and the said George Mallows, that, if, after any sale of the said premises so to be mortgaged, duly made under the said power of sale to be contained in the said mortgage-deed, the purchase-money should not be sufficient to satisfy the aforesaid sum of 1200*l.* and all interests, costs, charges, and expenses which might be then due in respect of the said mortgage, they would immediately thereafter make good and pay to the plaintiff and the said George Mallows such deficiency, whether the same should be occasioned by any defect in the title to the said premises or otherwise howsoever: Averment, that the plaintiff and the said George Mallows did accordingly advance to the said William Kirby the said sum of 1200*l.* as aforesaid on mortgage of the said premises, and that a mortgage-deed containing, among other things, a provision as to the payment of such interest as aforesaid, and also such power of sale as aforesaid, was duly executed and delivered by the said William Kirby to him the plaintiff and the said George Mallows; and that afterwards default was made by the said William Kirby, to wit, in not paying the said principal sum and interest according to the terms of the said mortgage-deed, whereby the said powers of sale became exercisable, and were thereupon duly exercised by the plaintiff (who had survived the said George Mallows) accordingly, and the said premises included in the said mortgage and powers of sale were duly and properly sold in virtue thereof; and the plaintiff said, that, upon the
*832] said sale, the purchase-money of *the said property was not sufficient to satisfy the said sum of 1200*l.* and a further sum amounting to 250*l.* then due in respect of the said mortgage for interest, costs, charges, and expenses, and that there was a deficiency thereon to the amount of 800*l.*; and that the plaintiff and the said George Mallows before his death, and the plaintiff since the death of the said George Mallows, respectively, did all things, and all things were done and happened, to entitle him the plaintiff to have the said sum of 800*l.* made good and paid to him as the survivor of the said George Mallows; but that the defendants had not paid the same, &c.

The defendants pleaded,—first, that they did not undertake or promise as in the declaration alleged,—secondly, that it was not proposed and intended as in the declaration alleged,—thirdly, that the plaintiff and George Mallows did not advance to Kirby the said sum of 1200*l.* as in the declaration alleged,—fourthly, that a mortgage-deed was not executed and delivered as in the declaration alleged,—fifthly, that the said powers of sale did not become exercisable, nor were they exercised, as in the declaration alleged,—sixthly, that the said premises were not sold as alleged,—seventhly, that there was not any deficiency upon the said sale, as in the declaration alleged. Issue thereon.

The cause was tried before Cresswell, J., at the sittings in London after last Trinity Term. It appeared that one Kirby, a builder, being desirous of obtaining 1200*l.* upon mortgage of four leasehold houses in Russell Terrace, Holland Road, in the county of Surrey, had applied to the plaintiff and Mallows to advance him that sum; that, after some negotiation, they consented to advance the money upon the defendants giving them by way of collateral security the guarantee set forth in the declaration; that the mortgagor, Kirby, having made default, and the interest being considerably in *arrear, the plaintiff (Mallows having in the mean time died) caused the premises to be put up [*833 to auction on the 20th of January, 1857, when they were knocked down to a Mrs. Savage for 900*l.*; and that, Mrs. Savage failing to pay the deposit and sign a contract, the premises were again put up on the 23d of February, when one Watson became the purchaser at 650*l.*, paid a deposit of 100*l.*, and signed the usual contract.

The conditions under which the property was put up to sale were as follows:—

"1. The highest bidder shall be the purchaser; and, if any dispute shall arise between two or more bidders, the property shall be put up again and resold; and no person shall advance less than 10*l.* at each bidding, nor retract his or her bidding.

"2. The purchaser shall, immediately after the sale, pay into the hands of the auctioneers a deposit of 20*l.* per cent. in part of the purchase-money, and sign an agreement to pay, at the office of the vendor's solicitors, Messrs. C. & H., the remainder of the purchase-money on or before the 25th of March, 1857, from which time the purchaser will be entitled to the rents and profits of the property, subject to the payment of the rents and performance of the covenants in the leases under which the property is held, and up to which time all outgoings will be cleared by the vendor; but, in case the purchase shall, from any cause whatever, not be completed by the time above limited, the purchaser shall pay interest after the rate of 5*l.* per cent. per annum on his or her unpaid purchase-money, from that time up to the day of the completion of the purchase. But this provision shall not prevent the vendor from requiring the completion of the purchase on the day appointed.

"3. The vendor will deliver an abstract of her title to the purchaser, or to his or her solicitor, and all objections (if any) to the title shall be stated in writing, and *delivered to the said Messrs. C. & H. [*834 within seven days of the delivery of such abstract, and all objections and requisitions not so made within such time shall be deemed to have been waived, and the purchaser shall be precluded from making any subsequent objection or objections to the title; and, in case any objection or requisition shall be made or raised on the part of the purchaser, which the vendor may be unable or unwilling to remove or comply with, the vendor shall be at liberty at any time to rescind the contract and put an end to the sale, upon repaying to the purchaser his or her deposit-money, without any interest, costs, damages, or expenses (notwithstanding any negotiation relative to such objection or objections that may have been carried on).

"4. The title shall commence with four several indentures of lease granted by Mr. John Roberts to Mr. W. Kirby in August, 1856, and the vendor shall not be required to prove or produce, nor shall the pur-

chaser be entitled to investigate, or make any objection in respect of, any earlier or other title than the said leases; *and the production of the receipt for ground-rent up to the 25th of December*, 1856, *shall be and be deemed sufficient and conclusive evidence of the performance, up to the time of completion of the purchase, of all the covenants in the lease to which the same refers.* Any written agreement or agreements which any tenant or tenants may have entered into, and which may not be stamped, shall not be required to be stamped, and no objection or requisition shall be taken or made with reference to such agreements being unstamped.

"5. On payment of the remainder of the purchase-money, and all interest due thereon, the purchaser shall be entitled to have executed to him or her, at his or her own expense, a proper conveyance, but the vendor, being only a mortgagee with a power of sale, shall not be
*835] *required to enter into any covenant other than a covenant that she has done no act to encumber.

"6. If any error or omission shall have been made in the description of the property, such error or mistake shall not annul the sale, but a compensation or equivalent shall be given or taken, as the case may require, such compensation or equivalent to be settled by two referees, or their umpire, to be appointed within seven days after the discovery of such error or omission, in the usual way.

"Lastly. If the purchaser shall neglect or fail to comply with the above conditions, or any of them, his or her purchase-money(*a*) shall be actually forfeited to the vendor, who shall be at full liberty to resell the property, either by public auction or private sale, with or without notice to such purchaser at the first sale, and the deficiency (if any) at such second sale, and all costs, charges, and expenses attending the same, shall, immediately thereafter, be made good to the vendor by the defaulter at this present sale, and, in case of non-payment thereof, the whole thereof shall be recoverable by the vendor as and for liquidated damages in an action at law, and it shall not be necessary first to tender any assignment to the purchaser; and the profit (if any) arising after(*b*) such second sale shall belong to the vendor."

The vendor not being able to produce the receipt for the ground-rent up to the 25th of December, 1856, which by the 4th condition was to be "sufficient and conclusive evidence of the performance of all the covenants in the lease," the purchaser (Watson) declined to complete the purchase; and, at the time this action was commenced, an action had been brought, and was still pending, against Watson, to recover damages for such non-completion.

On the part of the defendants, it was submitted that the action was
*836] prematurely brought, inasmuch as there *had been no "sale" within the meaning of the guarantee, and consequently no ascertained deficiency.

The learned judge directed a verdict for the plaintiff for the sum claimed, 789*l.* 17*s.* 10*d.*, reserving leave to the defendants to move to enter a verdict for them if the court should be of opinion that there had been no sale: and he stayed execution until the fourth day of the following term, on the defendants bringing into court within fourteen days 500*l.* to abide the event.

(*a*) "Deposit?" (*b*) "Upon?"

Lush, Q. C., in Michaelmas Term last, accordingly obtained a rule nisi to enter a verdict for the defendants, "on the ground that no sale of the property had been completed, and the event upon which the defendants were to be liable had not happened," and that the 500*l.* paid into court should be paid out to the defendants.

Collier, Q. C., and *Griffits*, now showed cause.—There was a sale, within the fair meaning of the guarantee, when there was a valid contract of sale. [COCKBURN, C. J.—It is an ambiguous term: it may mean either the proceeding which takes place at the auction, or the complete and final transfer of the property: it seems to me to be used in the latter sense here.] A vendor may recover the purchase-money, even though no conveyance has been tendered. Thus, in Mattock *v.* Kinglake, 10 Ad. & E. 50 (E. C. L. R. vol. 37), 2 P. & D. 343, on an agreement for the sale of lands, the defendant covenanted to pay the purchase-money on a day certain, for and as the consideration of such sale and purchase, with interest from a day certain to the time of "the completion of the purchase;" and it was held that the covenant of the defendant was an independent covenant, and that the vendor might recover the purchase-money without tendering a conveyance. [WILLES, J.—There is no doubt about that. *COCKBURN, C. J.—You had two courses open to you,—to enforce performance of the contract [*837 by the vendee, or to bring your action for the breach of it. You chose the latter course. What is to prevent your putting up the property to sale again?] Equity would prevent that. In the action against the vendee, the plaintiff might recover the stipulated purchase-money; and then he would be bound to convey. [WILLIAMS, J.—If the purchaser refuses to complete the purchase, equity will not restrain the vendor from selling again.] There is no absolute refusal here. [COCKBURN, C. J.—Surely your action is prematurely brought: you may peradventure hereafter sell the property for the full amount for which it is charged.] The contract of sale in equity operates a complete change in the property. In Addison on Contracts, 4th edit. 159, it is said,—"The execution of a simple contract in writing for the sale and purchase of an estate in fee, although accompanied by livery and seisin, or delivery of possession of the lands to the purchaser, does not, since the passing of the transfer of property act, transfer to the latter the estate or interest agreed to be sold. The written contract, if it amounts to a grant of the fee, would be a feoffment, and would be avoided by the section of the act which enacts that 'a feoffment (other than a feoffment made under a custom by an infant) shall be void, unless evidenced by *deed*.' A right to have a conveyance of the land passes by the contract to the purchaser, but not any legal estate or interest in the land itself beyond an estate at will. *In equity, however, the contract operates as an immediate transfer of the estate itself.* 'The effect of the contract is very different at law and in equity. At law, the estate remains the estate of the vendor, and the money that of the vendee (until a formal conveyance has been executed). In equity, the estate, from the signing of the contract, becomes the real property of the vendee. It is vendible *as his, chargeable as his, capable of being encumbered as [*838 his, devised as his; it may be assets, and will descend to his heir.'(*a*)" [COCKBURN, C. J.—Does that apply where the purchaser

(*a*) Per Lord Eldon, Seton *v.* Slade, 7 Ves. 274.

repudiates the contract?] The purchaser does not repudiate the contract: he declines to complete until a certain requisition is complied with. He insists upon the production of the receipts for ground-rent: he is not entitled to that. [CROWDER, J.—Still the question is, what is the meaning of the guarantee? It must necessarily mean a *perfected* sale, otherwise there is no ascertained deficiency.] The plaintiff cannot recover more than the 650*l.* from the vendee. Besides, in equity there has been a perfected sale, and that satisfies the terms of this guarantee. In Baldwin *v.* Belcher, 1 Jones & Latouche 18, 26, Lord Chancellor Sugden says, that, "though the purchaser [before the conveyance] has neither a legal nor an equitable right, as against the seller, until he pays the purchase-money, yet, for all purposes of disposition, the equitable estate which he obtained under the contract of sale is subject to his control:" and he adds,—"There is no doubt as to that point: it is a land-mark of the court, and ought not to have been questioned." Again, in Addison, p. 180: "Before the vendor can maintain an action for the recovery of damages by reason of the neglect of the purchaser to tender and accept a conveyance of the estate, and pay the purchase-money, he must produce and establish a good title to the estate agreed to be sold, and it must appear that he was ready and willing to execute a conveyance thereof to the purchaser, on receiving payment of the purchase-money." "So long as a conveyance under seal has not been executed, and a legal transfer of the property from the vendor to the purchaser effected at common law, the vendor cannot *839] *sue for the purchase-money, for he cannot have both the estate and the money; but he is entitled to recover all the damages he has sustained by the breach of contract, and all the costs, charges, and expenses he has incurred." Again, at p. 1141, it is said: "If an estate agreed to be sold has been actually conveyed by the vendor to the purchaser, and has become the property of the latter, and the vendor sues for the non-payment of the purchase-money, the measure of damages is obviously the price agreed to be paid, with interest; but, if no conveyance has been executed, and the estate still remains the property of the vendor, the measure of damages is, the difference between the price agreed to be paid and the marketable value of the property, for the vendor cannot be permitted to have both the estate and the purchase-money." For this Laird *v.* Pim, 7 M. & W. 474,† is referred to. [WILLIAMS, J.—In the argument of that case it is said that "Sir E. Sugden, 1 V. & P., 10th edit. 374, appears to consider that a vendor may recover the purchase-money without having executed a conveyance, where the purchaser has discharged him from so doing." Lord St. Leonards alludes to that in his 18th edition, 201, n. (*t*),(*a*) where he seems to deny the inference there drawn from his work: he says,—"The passage in the text was not intended to refer to the amount to be recovered."] In Laird *v.* Pim, the conveyance of the estate and the payment of the purchase-money were to be simultaneous acts. Wilks *v.* Smith, 10 M. & W. 355,† is somewhat at variance with the case last cited. There, the declaration alleged, that, by an agreement made between the plaintiff and the defendant, the plaintiff agreed to sell, and the defendant to buy, certain building ground, for the sum of 120*l.*,

(*a*) The same observation occurred in the 12th edition, p. 171, n. (*y*).

which the defendant agreed to pay the plaintiff on or before *the expiration of four years, with interest at 5*l.* per cent. half-yearly, [*840 until paid; and it averred that the four years had not expired, that the 120*l.* had not been paid, and that 12*l.* had become due for interest: and it was held that the declaration was good, and that the plaintiff was not bound to aver that he had delivered possession of the land, or that he had title to the land, or was ready and willing to convey it. Here, the purchase-money was to be paid on a given day, which had passed. The case is in that respect very like that of Dicker *v.* Jackson, 6 C. B. 103 (E. C. L. R. vol. 60). There, the declaration stated, that, on the 2d of September, 1844, the plaintiff entered into certain articles of agreement with the defendant for the sale of a piece of land, whereby the plaintiff agreed that he would, within one month from the date thereof, or from being required so to do, deliver to the defendant an abstract of his title to the said premises, and deduce a clear title thereto, and that the defendant did thereby agree that he would pay the purchase-money as follows,—the sum of 548*l.* 18*s.* 10*d.* on the signing of the contract, and the residue or sum of 4940*l.* 10*s.* on or before the 2d day of September, 1848, together with interest, &c. The declaration,—after alleging that the plaintiff did, before the commencement of the suit, and within one month from being required so to do, deliver to the defendant such an abstract of his title to the said premises, and deduce such a clear title thereto, as in and by the said articles in that behalf specified and required,—alleged for breach the non-payment by the defendant of the residue of the purchase-money. The defendant pleaded, that the plaintiff did not deliver to the defendant an abstract of title to the said premises, *and* deduce such a clear title thereto, as in and by the said agreement specified and required, modo et forma, &c. And the plea was held bad, inasmuch as the performance by the plaintiff of the contract with respect to *delivering an abstract, &c., was not [*841 a condition precedent to his right to maintain an action for the non-payment of the purchase-money, and consequently that the allegation in the declaration of such performance was immaterial and not traversable. It is plain that there has here been such a sale as to entitle the plaintiff to recover the difference upon the defendants' guarantee.

Lush, Q. C., and *R. Clark*, contrà, were not called upon.

COCKBURN, C. J.—I am of opinion that this rule should be made absolute. The case appears to me to be a very clear one. The action is brought upon a guarantee given by the defendants, whereby they undertook, that, if after any sale of certain property referred to, the purchase-money should not be sufficient to satisfy a sum of 1200*l.* which had been advanced on mortgage thereof, and all interest, costs, charges, and expenses which might be due in respect of the mortgage, they would immediately thereafter make good and pay to the plaintiff such deficiency. The question turns upon the construction of the word "sale" in that instrument. I am clearly of opinion, that, taken in conjunction with the rest of the document, it means a *completed* sale. If not, it is obvious that the plaintiff might treat the sale as incomplete (as, indeed, he has done), and bring an action against the vendee, and, having recovered damages against him for his breach of contract, put the property up to sale again, and perhaps realize more than the amount of the charge upon it: or, he might compromise with the vendee, and resell. The amount of the deficiency which

the defendants were to make good could only be ascertained by a complete sale and realization of the price. It is said that there was a suffi-
*842] cient sale within the meaning of the guarantee, because there *was a contract which a court of equity would enforce. It is unnecessary, however, to enter into that. The plaintiff has not resorted to a court of equity. The plain meaning of the guarantee being as I have stated, we need not speculate upon what a court of equity would do. It is enough to say that the contract has not been carried out, and consequently that the action is not at present maintainable.

WILLIAMS, J.—I am entirely of the same opinion. The word "sale" in the guarantee must mean such a sale as that the proceeds shall be realized, otherwise there are no means of measuring the damages the plaintiff is entitled to recover against the present defendants. They may be larger or smaller according to the fortune of a resale. It is said that the plaintiff would be estopped from demanding more than the 650*l.* from the purchaser in the action against him. But that does not exclude the other contingency. It may be that the contract may never be performed, and a resale may be more advantageous to the defendants. The plaintiff has no right to exclude them from that chance. As to whether, in the action against the vendee, the full amount of the stipulated purchase-money may be recovered, I cannot entertain a doubt. Laird *v.* Pim, 7 M. & W. 474,† is in point. But I do not see that that is decisive of this matter. The action against the purchaser may be defeated, and there may be a bill in equity to enforce performance of the contract. And it may be that a resale might produce more, and so the damages recoverable against the present defendants might be materially lessened. What the effect of the contract is in equity, has nothing to do with the present question.

CROWDER, J.—The question is, what is the meaning of the term
*843] "sale" in this guarantee. Looking at all the *circumstances, and at the consequences of a different construction, I can arrive at no other conclusion than my Lord and my Brother Williams have arrived at. It seems to me to be impossible that the construction contended for by Mr. *Collier* can be that which the parties intended. The property was about to be mortgaged, and the defendants, in consideration of the plaintiff agreeing to advance 1200*l.* thereon, bound themselves to make good any deficiency that might arise on a sale. It never could have been intended that it should rest on the mere contract. Many circumstances might arise which would enable the plaintiff to realize much more, or cause him to realize less, than the contract gave him. I think the parties clearly contemplated such a sale as should realize the amount of the purchase-money, and show definitively the balance for which the defendants were to be liable. The plaintiff assumes that the purchaser has committed a breach of his contract, and brings an action for that breach. Now he says he is entitled to specific performance. That is blowing hot and cold. Suppose the contract should for any fair reason be altered or rescinded, why are not the defendants to have the value ascertained by another sale? It might turn out for their benefit. It may be that the purchaser is unable to pay, and that the sale is rescinded on that account. How is the amount of the defendants' liability to be ascertained until there has been a resale?

WILLES, J.—I am entirely of the same opinion. The sale mentioned

in the guarantee must be understood to mean a sale by which it is ascertained that the mortgagee can get nothing more out of the land. Until the result of the action against the vendee is known, and the contract with him either carried out or rescinded, and the property sold again, I cannot say that the time *has arrived when the security has [*844
become exhausted: and, until that has happened, the surety cannot be called upon. In Hallen *v.* Runder, 1 C. M. & R. 266, 271,† 3 Tyrwh. 959, it being said in argument that "it has been the practice, where the possession of land sold has been given, to insert a count for land bargained and sold," Parke, B., said: "There you must show an actual conveyance of the land to the defendant, and the mere act of giving possession would not be sufficient to maintain the indebitatus count. In point of practice, such a count seldom occurs, and it generally could not be sustained, because he deed of conveyance which must be shown to pass the interest in the land, generally contains a release of the purchase-money." I think this rule must be made absolute.

Rule absolute.

Collier prayed that the rule might be made absolute to enter a nonsuit, instead of a verdict for the defendants.

To this the court assented, and the rule was accordingly drawn up to set aside the verdict and enter a nonsuit, and for the payment of the 500*l.* out of court to the defendants' attorney.

On a subsequent day in this term (*Jan.* 27), upon *affidavits [*845
stating that the defendants and their attorney had been informed since the above rule was made absolute, that the plaintiff had died on the 14th of December last, and that due search had been made at "the principal registry of Her Majesty's Court of Probate in Doctors' Commons," but that no probate of the will or letters of administration had been granted of the estate and effects of George Moor, the plaintiff,

R. Clarke moved for a rule to show cause why the rule of the 12th should not be amended by entering a verdict for the defendants instead of a nonsuit. He referred to the 139th section of the Common Law Procedure Act, 1852, which enacts that "the death of either party between the verdict and the judgment shall not hereafter be alleged for error, so as such judgment be entered within two terms after such verdict;" and he submitted that the corresponding provision in the 17 Car. 2, c. 8, having been held not to apply to nonsuits,(*a*) the defendants were, by the indulgence granted to the plaintiff in varying the form of the rule, deprived of the power of entering their judgment and proceeding thereon by scire facias. [WILLIAMS, J.—Why should you not enter your judgment as of the term after the trial, nunc pro tunc? The delay was the act of the court.] In Blewett *v.* Tregonning, 4 Ad. & E. 1002 (E. C. L. R. vol. 31), under the rules of Hilary, 4 W. 4, General Rules and Regulations 3,(*b*) it was held, that, where the plaintiff has obtained a verdict, but the defendant has obtained a rule nisi for a new trial, which after the lapse of a year has been discharged, and in the mean time the defendant has died, the court will order judgment to be entered nunc pro tunc, though more than two terms have elapsed since the

(*a*) See Tidd's Practice, 9th edit., p. 933. (*b*) See rule 56 Hilary, 1853, 13 C. B. 16.

discharge of the rule, if it appear that the delay was occasioned by the
*846] *taxation of costs, and no fault be specially imputed to the plaintiff. [COCKBURN, C. J.—Upon whom will you serve the rule? Who are you to call upon?] Upon the personal representatives. [COCKBURN, C. J.—But you say there are none.]

The Clerk of the Rules having informed the court that a similar difficulty had arisen in a case of Devaux *v.* Connolly, in the year 1850, and that the court had then ordered the rule to be drawn up calling upon the legal representatives of the plaintiff (if any), upon notice of the rule to be given to them or to the attorney in the cause of the late plaintiff, they directed the same form to be adopted here.

Griffits now showed cause, instructed by the late plaintiff's attorney.—He submitted that the court had no power to make the rule absolute, inasmuch as there were no existing legal representatives of the late plaintiff; and, if there was a will unproved, it would be premature to make absolute a rule which would bind them, when they had never been in a position to be heard in opposition to it. Besides, there is already a judgment of nonsuit upon the record, and this rule does not seek to set that aside. [WILLIAMS, J.—That judgment amounts to nothing.] Whatever its value, there it remains. [WILLES, J.—The rule we are about to pronounce will if necessary remove it.] A judgment of nonsuit is no more within the 139th section of the Common Law Procedure Act, 1852, than it was within the statute of Charles. [WILLIAMS, J.—This application is not founded upon the Common Law Procedure Act, 1852. If it were, no motion would be necessary. The record will run from the time of the trial. The plaintiff, being called, did not come.]

*847] *R. *Clarke*, in support of his rule, was stopped by the court.

COCKBURN, C. J.—I am of opinion that this rule must be made absolute. The court is now called upon to rectify what was done at the trial, acting nunc pro tunc. The executors will not be in any respect prejudiced. This is not a fresh proceeding taken after the death of the plaintiff. It is a proceeding, not under the statute, but under the ordinary inherent jurisdiction of the court. The whole is to be taken to have been done at the time of the trial. As to the circumstance of a judgment of nonsuit being already entered, that makes no difference. If it is wished, it may be made a part of this rule that that judgment be set aside.

WILLIAMS, J.—I am of the same opinion. When it is agreed at Nisi Prius that leave should be reserved to the defendants to move to enter a nonsuit, it amounts to this, that a nonsuit is to be entered if the court so think fit; but it is treated as if there had been a formal nonsuit at the trial. If that had taken place here, the defendants would have been entitled to enter their judgment before the death of the plaintiff. By the act of the court, the entry of the judgment has been delayed until after the plaintiff's death. By entering the judgment nunc pro tunc, the parties will be precisely in the same situation as if there had been immediate judgment. The fact of the will not having been yet proved can make no difference. It will be perfectly competent to the executors, when they have proved the will, to come and ask the court to set aside the judgment, if they can show any reasonable and substantial ground for so doing. But I must confess I do not see what grounds they can have.

*CROWDER, J.—I am of the same opinion. I see no reason why the arrangement that was made at the trial should not be carried out. The defendants are not to be prejudiced by the delay which has arisen from the act of the court. [*848

WILLES, J., concurring, Rule absolute.

END OF HILARY TERM.

MEMORANDUM.

IN the course of this Term, viz. on the 15th of January, The Hon. Sir William Maule, formerly one of the judges of this court, died, in his 70th year.

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Under 15 & 16 *Vict. c.* 76, *s.* 222.

By a deed of settlement made by the defendant in 1842, under a power contained in his father's will, a term of 1000 years in certain estates was limited to Teed and White, in trust, by mortgage, sale, or otherwise, to raise a sum not exceeding 10,000*l.* for payment of the defendant's debts; and in 1843 the trustees assigned the term by way of mortgage to A. and B., the defendant being a party to the deed, covenanting for payment of the principal and interest, and also for title in the trustees, and for quiet enjoyment by the mortgagees in case of default. This assignment contained a power to the defendant to lease, *by and with the consent and approbation of the mortgagees, their heirs,* &c. In 1846, the defendant, without having obtained the consent of the mortgagees, granted a lease of part of the lands to the plaintiff, with a covenant for quiet enjoyment during the term, "without the let, suit, trouble, denial, *eviction, molestation,* or *disturbance* of the lessor, his heirs or assigns, or any person or persons claiming or deriving, or to claim or derive, by, from, or under him, them, or any of them." The plaintiff in 1851 received a notice from the surviving mortgagee, informing him of the mortgage, and that the principal and interest were unpaid and in arrear, and requiring the plaintiff to pay rent to him. Having consulted his attorney, and finding that he could not successfully resist the claim of the mortgagee, the plaintiff consented to give up possession of the land to him, and the mortgagee entered and took possession,—paying the plaintiff 75*l.* as a compensation for certain improvements. In an action against the lessor for breach of the covenant for quiet enjoyment, the breach assigned in the declaration alleged an "eviction" only, and that by one having title "by virtue of a mortgage theretofore to him (the plaintiff) made *by the defendant:*"—The court amended the declaration, by alleging the eviction to have been by one claiming "by, from, or under the defendant," and adding that the plaintiff was "molested and disturbed" in his enjoyment of the premises. *Carpenter* v. *Parker,* 206

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Upon an appeal from the Common Pleas to the Exchequer Chamber, under the 34th and 35th sections of the Common Law Procedure Act, 1854, the Court of Appeal were equally divided,—Held, that, notwithstanding, there was a sufficient affirmance of the judgment of the court below to justify an appeal to the House of Lords. *Hickman* v. *Cox*, 523, 568

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Enforcing Award.

1. *What put in issue by a plea of nul tiel agard.*]—A plea of nul tiel agard to an action upon an award, puts in issue not merely the fact of the making of the award set out in the declaration, but the making of a good and valid award of and concerning the premises referred. *Roberts* v. *Eberhardt*, 482

Setting aside Award.

2. *Mistake of the Arbitrator.*]—The decision of an arbitrator, whether a lawyer or a layman, is binding on the parties both in matters of law and in matters of fact, unless there has been fraud or corruption on his part, or there be some mistake of law apparent on the face of the award, or of some paper accompanying and forming part of the award. *Hodgkinson* v. *Fernie*, 189

3. Thus, where a verdict was taken for the plaintiff, subject to the award of an arbitrator *as to the amount of damages*, and his award included an amount of damages which (it was assumed) the plaintiff was not legally entitled to in the action,—the court refused to interfere. *Ib.*

4. And, held, that it was not a case for remitting the matter back to the arbitrator for reconsideration, by virtue of the 8th section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125),—that clause being intended only to apply to cases where before the act such a course might have been adopted under the provision in the submission or order of reference usually known as "Mr. Richards's clause." *Ib.*

Want of Finality.

5. A. and B., who had carried on business as coal and lime masters, agreed to dissolve their partnership upon certain terms. B. having died, leaving his wife his executrix, it was agreed between A. and the executrix that the agreement for dissolution should be carried out, and that the settlement of all disputes thereon should be referred to an arbitrator. A. and B. had also carried on business in partnership as attorneys; and, by another agreement, reciting that disputes had arisen between A. and the executrix about the last-mentioned partnership and the accounts thereof, all matters in dispute relating thereto were referred to the same arbitrator; and it was agreed that the arbitrator so appointed should be receiver of the estate and effects of the law partnership, and should settle and get in as he thought fit all costs due to the estate, and "dispose of the estate, moneys, and effects of the said law partnership in such manner as he should think best for the interest of A. and the executrix," and that "the costs and expenses of the reference and award should be in his discretion." By his award, the arbitrator, amongst other things, stated that he had "received the estate, moneys, and effects belonging to the estate of the said law partnership, and in the said second agreement mentioned to be then remaining unrealised," and had "got in and settled, on such terms as he thought fit, all bills of costs due to the estate of the said law partnership, and had *disposed of the estate, moneys, and effects of the said law partnership in such manner as he had thought best for the interests of A. and the executrix;*" and he awarded that the sum of 1069*l.* 13*s.* 8*d.* was due from the executrix to A., and ordered her to pay the same to him within one week: he then awarded mutual releases, and he concluded thus,—"I *certify* that I have deducted and retained to myself the costs [not saying how much] of this my award out of the moneys which have been received by me as such receiver as aforesaid:"—

Held, by Cockburn, C. J., Cresswell, J., and Willes, J., that the award was void, both because it did not show how the costs of the award were to be paid, and so was not final, and because the arbitrator had retained, from a fund belonging to the parties which was in his possession as receiver for them, the amount of his costs before he signed and delivered his award.

Held, by Williams, J., that the award was good, notwithstanding these objections,—the arbitrator having authority as receiver to dispose of the moneys he received as he should think best for the interest of the parties, and having exercised his discretion in disposing of some of those moneys in defraying the costs of the award, and therefore not having neglected his duty as arbitrator in omitting to adjudicate as to the costs of the award. *Roberts* v. *Eberhardt*, 482

The judgment of the majority was reversed by the Exchequer Chamber, on appeal,—the majority of that court being of opinion that the award was not void for the reasons assigned. *Roberts* v. *Eberhardt*, 506

Costs of Award.

7. An arbitrator cannot, unless such power is

expressly reserved to him by the submission, award to himself a sum (named or otherwise) for his own costs and expenses. *Roberts* v. *Eberhardt*, 482

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8. *Duty of the master.*]—Where a reference is made to the master by judge's order under the 3d section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), he must proceed with the inquiry, even though a question of fraud should incidentally arise before him. *Insull* v. *Moojen*, 359

9. *Action on bill of exchange.*]—The court refused to refer an action upon bills of exchange to the master, under the compulsory clauses of the Common Law Procedure Act, 1854. *Pellatt* v. *Markwick*, 760

10. *Remitting back to the arbitrator.*]—A cause in which the defendant had pleaded never indebted, the statute of limitations, payment, set-off, and accord and satisfaction, was referred to a county court judge under the compulsory clauses of the Common Law Procedure Act, 1854; the costs of the cause to abide the event of the cause, and the costs of the reference to be in the discretion of the arbitrator. The county court judge certified "that the defendant was not at the time of the commencement of the action indebted to the plaintiff," and he found a general verdict for the defendant, and directed that the plaintiff should pay the costs of the reference:—the court sent the certificate back to be amended by stating the manner in which the several issues were found. *Holland* v. *Judd*, 826

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1. The court will, in virtue of its inherent power to prevent the abuse of its process, discharge from custody one who is improperly detained in execution in respect of a debt from which he is discharged by his certificate under the bankrupt act. *Thomson* v. *Harding* (*In re Hill*), 254

2. A. obtained judgment in an action against the official manager of a joint stock bank, and, having proved his debt under a fiat against the bank, and also under the 73d section of the Winding-up Act, 7 & 8 Vict. c. 111, attempted likewise to prove it under a fiat against B., a shareholder, against whom he had obtained an order for execution under the 7 & 8 Vict. c. 113, s. 13: the commissioner declining to admit the debt to *proof*, but receiving it as a *claim*, A. afterwards sued out a ca. sa. against B., and took him in execution *after he had obtained his certificate*:—Held, that B. was entitled to be discharged, on motion,—either by virtue of the 205th section of the Bankrupt Law Consolidation Act, 1849, 12 & 13 Vict. c. 106, or by virtue of the general inherent jurisdiction of the court over its own process. *Thomson* v. *Harding* (*In re Hill*), 254

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2. To an action by endorsees against the drawers of a bill of exchange, the court refused to allow the defendants to plead, by way of equitable defence, that a debt was due to the plaintiffs from a public company which had professed to assign its business and obligations to the defendants, that the bill was afterwards given by the defendants in consideration of that debt, and upon the supposition that the assignment was legal and valid, whereas it proved to be illegal and void,—the proposed plea affording no defence to the action, either legal or equitable. *Ib.*

Rate of Interest.

3. Where a bill is drawn for a given sum, "with interest at 10 per cent. per annum," the *drawer*, on the default of the acceptor, is liable for interest at 10 per cent. after the maturity of the bill and notice of the dishonour. *Keene* v. *Keene*, 144

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4. The court refused to allow a defendant to plead to an action against him as acceptor of a bill of exchange, that the bill was a renewal of a former bill which had been accepted upon a distinct understanding that it was to be renewed from time to time until the defendant should be of ability to meet it, he paying in the mean time interest at 10 per cent., that the defendant had always performed his part of the agreement, but that the plaintiff had refused to renew the bill upon application for that purpose, al-

though he well knew that the defendant was not of ability to pay it. *Flight* v. *Gray*, 320

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To secure a past Debt and a contemporaneous Advance.

In a case stated by a county court judge, upon an interpleader summons, for the opinion of this court, after setting out the facts under which a bill of sale had been given to secure a past debt and a contemporaneous advance, and finding that the transaction was bonâ fide,—the question submitted was, "whether the bill of sale was void as against the execution-creditors (the respondents), seising after the first instalment secured by the bill of sale became due, and whilst the debtor was allowed to remain in possession, and with his name over the door as it had been before,"—Held, that, there being nothing to show that the deed was fraudulent, the appellant was entitled to judgment. *Weaver*, App., *Joule*, Resp., 309

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Seven individuals associated themselves together for the formation and working of a mine upon the cost-book principle, and issued a prospectus describing the company as having a capital of 12,000*l.*, in 12,000 shares of 1*l.* each, to be paid upon allotment; and setting forth the usual reports of the mining captain that the mine was in full operation, and stating that the money was to be paid to Messrs. L. & Co., the bankers of the company. The plaintiff applied for and obtained an allotment of fifty shares, and paid 50*l.* to L. & Co., who gave him a receipt describing that sum as having been received by them for *the company*. The plaintiff, having afterwards discovered that not more than 1435 shares had ever been subscribed for or paid upon, brought an action against the directors to recover back his deposit, on the ground of failure of consideration:—Held,—affirming the judgment of the Court of Common Pleas,—that *all* the directors were liable, notwithstanding the account at the bankers' was kept *in the names of five of them only*. *Johnson* v. *Goslett*, 569

COSTS.

On Reference of Matters in Difference in a Cause.

1. Upon a reference of *all matters in difference in a cause*,—"the costs of the cause, and also the costs of the order and of the reference and award, to abide the event of the award,"—with power to the arbitrator to direct how the verdict in the cause should be entered; the costs of the cause follow the event of the cause as decided by the award. *Reynolds* v. *Harris*, 267

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2. In slander, the declaration contained four counts: the defendant pleaded not guilty

to the whole declaration, and further to the second count a multifarious plea of justification setting forth three several circumstantial statements of misconduct on the part of the plaintiff, any one of which would be a sufficient answer to the count: the plaintiff took issue on the pleas; and upon a reference of "all matters in difference in the cause," with a provision that "the costs of the cause, and also the costs of the order and of the reference and award, should abide the event of the award," and that "the arbitrator should have power to direct how the verdict in the cause should be entered," —the arbitrator found, upon not guilty, for the plaintiff as to the second and fourth, and for the defendant as to the first and third counts; and, as to the second issue, he found that the plea, so far as related to one of the matters justified, was proved, and as to the rest not proved; and, being of opinion that the part proved was an answer to the second count, he assessed no damages for the plaintiff on that count, but assessed his damages on the fourth count at 40*s.*:—Held, that the proper principle of taxation was, to allow the plaintiff no costs of any part of the plea of justification, and the defendant costs only of the part expressly found to be true, including costs of evidence applicable to such part, though also applicable to the residue of the plea, but not costs of any evidence applicable exclusively to that part of the plea which was found to be untrue. *Reynolds* v. *Harris*, 267

Of Witnesses.

3. *Defendant's own attendance.*]—In an action for goods sold, the delivery having been proved by the plaintiff's carman, the defendant's wife and servants were called to prove that the goods had been paid for on delivery, —the latter swearing that they had on each occasion paid the carman, having received the money for that purpose, sometimes from the defendant's wife, and *sometimes from the defendant himself*,—and the former, that, as to part, she had given the money to the servants for the purpose of making the payments. On the trial, the defendant was in court, but was not called as a witness until observations had been made by the plaintiff's attorney on account of his not being put into the box. A verdict having been found for the defendant, and the master having on taxation declined to allow him the costs of his attendance,—the court directed a review; holding that the defendant's attendance as a witness was under the circumstances advisable and proper, and that it did not lie in the plaintiff's mouth to say that it was not necessary. *Flower* v. *Gardner*, 185

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Where plaintiff recovers less than 5l. damages in a case where the county court has jurisdiction.

4. A. sued B. for an assault, with a count for slander, and obtained a verdict on the first count for *5l.*, but failed to establish a cause of action on the second count:—Held, that he was entitled to no costs.—*Smith* v. *Harnor*, 829

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5. *Semble*, that a question as to the taxation of costs will not in general be entertained at Chambers. *Smith* v. *Harnor*, 829

Plaintiff Suing in Person.

6. In an action by an infant, the writ was sued out *in person*, and, one E. B. being appointed next friend, a copy of the order for that purpose was served on the defendant's attorney, endorsed "E. B., next friend, at S. N. C.'s, No. 8, Symond's Inn, Chancery Lane;" and a declaration was afterwards delivered with a notice to plead similarly signed. The plaintiff having obtained a verdict,—Held, that the above was a sufficient notice to the defendant that S. N. C. was authorized by the next friend to act as attorney; and, the master having on taxation allowed only costs out of pocket, the court refused to set aside an order directing him to review his taxation. *Bryant* v. *Wilson*, 722

COUNTY COURT.

See COSTS, 4.

COVENANT.

Joint or Several.

1. Where the interest of the covenantees is joint, although the covenant is in terms joint and several, the action follows the nature of the contract, and must be brought in the names of all the covenantees. *Pugh* v. *Stringfield*, 2
2. P., D., and G. had severally advanced moneys to one F. on mortgage of three several parcels of land, and had severally brought actions against F. For putting an end to the actions, and securing these several debts, an indenture was prepared and executed, to which F. was a party of the first part, P. of the second, D. of the third, G. of the fourth, and certain other persons of the fifth part. By this indenture, F. covenanted to complete certain buildings on the mortgaged premises respectively, according to certain plans, and P., D., and G. covenanted to advance him a certain sum during the progress of the works. The defendants thereupon gave P., D., and G. a guarantee, stating, that, in consideration of the arrangements entered into by them, and their covenanting to advance the moneys mentioned to F. for the purpose of enabling him to complete the buildings, they guarantied that F. should

perform his covenants with them in the indenture,—"the joint and separate liability of the defendants not to exceed 100*l.*:"—Held, that P. alone could not maintain an action against the defendants upon the guarantee, the interest of the three therein being joint, and not several. *Pugh* v. *Stringfield*, 2

And see FORFEITURE.

DAMAGES.

Measure of.

1. *For breach of contract to deliver goods, &c.*]—In an action for the breach of a contract by delivering goods of a quality inferior to that contracted for, the proper measure of damages is, the difference between the value of goods of the quality contracted for, at the time of the delivery, and the value of the goods then actually delivered,—or their value as ascertained by a resale within a reasonable time: and the fact of the goods having been previously paid for cannot be taken into consideration in estimating the damages. *Loder* v. *Kekulé*, 128

2. The defendant, a merchant in Spain, agreed to consign to the plaintiffs, agents in London, all the raisins which should be shipped by him for this country, to sell for him for a certain commission on the "invoice price." In an action to recover the amount of commission on two shipments consigned by the defendant, in breach of his agreement, to third persons,—Held, that it was competent to the plaintiffs to show the proximate value of the consignments upon which they claimed commission, without producing the *invoices*. *Plank* v. *Gavila*, 807

3. *Quære*, as to the meaning of "invoice price?" *Ib.*

In Action upon a Guarantee.

4. In consideration that the plaintiff would advance 1200*l.* to a third person upon mortgage of certain leasehold premises, the defendants promised, that, if, after any *sale* of the said premises duly made under the power of sale to be contained in the mortgage-deed, the purchase-money should not be sufficient to satisfy the principal sum and all interest, costs, charges, and expenses which might be then due in respect of the mortgage, they would immediately thereafter make good and pay to the plaintiff such deficiency, whether the same should be occasioned by any defect in the title to the premises or otherwise howsoever. The premises having been put up to auction under the power of sale, were knocked down to one W. for 650*l.*, and W. paid a deposit of 100*l.* and signed the usual contract: but he afterwards declined to complete the purchase, on the ground of the vendor's inability to produce certain receipts for ground-rent; and the plaintiff brought an action against him to recover damages for his alleged breach of contract, which action was still pending:—Held, that, under these circumstances, a concurrent action against the defendants upon their guarantee was premature,—the word "sale" in that instrument meaning a sale *completed*, so that the deficiency which was to be made good by the defendants could be ascertained. *Moor* v. *Roberts*, 830

In Action against an Agent for Negligence.

5. A., a merchant at Seville, wrote to B., his agent at Liverpool, desiring him to insure a cargo of fruit to that place. B., acting bonâ fide, instructed one C., a person who had occasionally acted as A.'s agent in London, to get a policy effected there. C. for that purpose employed one D., an insurance-broker, who effected the insurance in his own name, and afterwards received the amount of a loss from the underwriters, but retained it, claiming a lien for a debt due to him from C. in respect of premiums and commission on former transactions. In an action by A. against B. for negligently omitting to effect a good and available insurance upon the cargo, and neglecting to take steps to get the money, and for money had and received, the judge,—treating it as immaterial whether the letter of instructions from B. to C. had been shown to D. or not,—ruled that B. had violated his duty as agent, by employing another agent in London, instead of effecting the policy himself, and that he was responsible for the whole amount received from the underwriters by D.:—Held, that this was not the true measure of damages; for, that, if B.'s letter of instructions had been shown to D. at the time he was employed to effect the policy, he could acquire no lien upon the proceeds for the debt due to him from C., and his unlawful detention of the money could not give A. a right of action against B. for the whole amount so received by D., though B. might be liable for some nominal damages in respect of the breach of his duty as agent; and therefore that fact ought to have been ascertained. *Cahill* v. *Dawson*, 106

DATE.

Presumption that an instrument is drawn at the time of which it bears date. *Lawes* v. *Rand*, 442

DEVISE.

Construction of.

Merger of life-estate in reversion in fee.]—A testatrix, being seised in fee of certain lands, devised the same to her niece E. *for life*, remainder to her children, and, in default

of issue, to her nephew P. H. in fee: and, by a residuary clause, the testatrix gave "all the residue and remainder of her estate and effects, whatsoever and wheresoever, not thereinbefore disposed of," unto her said niece E., her heirs and assigns, for ever. E. died without issue, having survived the testatrix, and having by lease and release conveyed all her estate to J., in fee:—Held, that the reversion in fee, undisposed of by the former part of the will, passed to E. by the residuary devise; and that, the life estate and the reversion having both become vested by the conveyance in J., the contingent remainder of P. H. was destroyed by the merger thus occasioned. *Egerton* v. *Massey*, 338

DIRECTORS.

See COST-BOOK MINE.

DISCOVERY.

See DOWER.

DISTRESS.

See LANDLORD AND TENANT, 1, 2, 4. TRESPASS.

DISTURBANCE.

See EVICTION.

DOWER.

Inspection of deed.

A demandant in dower is not entitled to inspection of the deed under which the property out of which she claims to be endowed was conveyed away by her husband, as against a bonâ fide purchaser for value, without notice of the marriage,—the balance of authorities being assumed to be in favour of the position that a bill for discovery could not be sustained in such a case. *Gomm*, dem., *Parrott*, ten., 47

EASEMENT.

See WAY.

EFFECTS.

See INSURANCE, 3.

EJECTMENT.

Right to begin.

In ejectment by heir against devisee, the heirship being admitted, the defendant is entitled to begin. *Sutton* v. *Sadler*, 87

Effect of judgment in, since the 15 *&* 16 *Vict. c.* 76,—*See* PRISONER, 2.

ENCLOSURE ACT.

See TITHE RENT CHARGE.

EQUITABLE DEFENCE.

See BILL OF EXCHANGE, 2. PLEADING.

EVICTION.

What amounts to.

By a deed of settlement made by the defendant in 1842, under a power contained in his father's will, a term of 1000 years in certain estates was limited to Teed and White, in trust, by mortgage, sale, or otherwise, to raise a sum not exceeding 10,000*l.* for payment of the defendant's debts; and in 1843 the trustees assigned the term by way of mortgage to A. and B., the defendant being a party to the deed, covenanting for payment of the principal and interest, and also for title in the trustees, and for quiet enjoyment by the mortgagees in case of default. This assignment contained a power to the defendant to lease, *by and with the consent and approbation of the mortgagees, their heirs,* &c. In 1846, the defendant, without having obtained the consent of the mortgagees, granted a lease of part of the lands to the plaintiff, with a covenant for quiet enjoyment during the term, "without the let, suit, trouble, denial, *eviction, molestation,* or *disturbance* of the lessor, his heirs or assigns, or any person or persons claiming or deriving, or to claim or derive, by, from, or under him, them, or any of them." The plaintiff in 1851 received a notice from the surviving mortgagee, informing him of the mortgage, and that the principal and interest were unpaid and in arrear, and requiring the plaintiff to pay rent to him. Having consulted his attorney, and finding that he could not successfully resist the claim of the mortgagee, the plaintiff consented to give up possession of the land to him, and the mortgagee entered and took possession,—paying the plaintiff 75*l.* as a compensation for certain improvements. Upon a case stated for the opinion of the court:—Held, that the plaintiff was entitled to maintain an action upon the covenant for quiet enjoyment,—the facts showing an eviction, or, at all events, a molestation and disturbance of the plaintiff, by one claiming title by, from, or under the defendant. *Carpenter* v. *Parker*, 206

EXECUTION.

Discharge from,—See BANKRUPT. PRISONER.

EXECUTORS AND ADMINISTRATORS.

Liability on contracts of their testator or intestate,—See JOINT STOCK BANK, 2.

FAILURE OF CONSIDERATION

See PRINCIPAL AND AGENT.

FINALITY.

See ARBITRAMENT, 5.

FORBEARANCE.

See BILL OF EXCHANGE, 1.

FOREIGN JUDGMENT.

Action on.

The 43 G. 3, c. 53 (Irish), s. 8, provided that, whenever it appeared to the court out of which the process issued that all due diligence had been used to have the process personally served, yet that, under the special circumstances, appearing to the court by affidavit, it was impossible to procure personal service, it should be lawful for the court to substitute such other kind of service as to them should seem fit.

The 8th section of the 13 & 14 Vict. c. 18 (Irish), in the case of corporations, provides for service upon corporate bodies having a known and responsible officer or agent, by serving such agent, and authorizes the plaintiff, in default of appearance by the defendants, upon affidavit of such service, and of the publication of a notice of the issuing of the writ in the Dublin Gazette and in a local newspaper, to enter an appearance and proceed. And the 9th section enables the court or a judge, where it is made to appear that the defendant has not been personally served, and that due and proper means were used to serve the writ, "or that such defendant resides out of the jurisdiction of the court, and can be properly served through or upon any agent, or has removed to avoid service, or on any other good and sufficient grounds," to authorize such substitution of service through the post-office, or in such manner as to them or him shall seem fit.

A writ of summons issued out of the Court of Queen's Bench in Ireland, after the passing of the last-mentioned act, against an incorporated joint stock company registered and carrying on business in London, and also carrying on business by one R., an agent, in Dublin, was, under an order of the court for substituted service, served by delivering a copy, with a copy of the order, to the Dublin agent, R., and by sending similar copies by post, addressed to the company's agent at their office in London. An appearance was afterwards, by leave of the court, entered upon such service, and judgment signed against the company:—

Held,—affirming the judgment of the Court of Common Pleas,—that an action might be maintained upon such judgment in the courts of this country; there being nothing to show that it was contrary to natural justice, or pronounced without jurisdiction. *Sheehy* v. *The Professional Life Assurance Company*, 597

FORFEITURE.

Who may take Advantage of.

1. *Assignee of reversion.*]—*Quære*, whether the assignee of the reversion can avail himself of a forfeiture arising out of a breach of a covenant to complete the premises demised (in carcase) within a given time,—a breach having been incurred before the assignment to him? *Bennett* v. *Herring*, 370

How incurred.

2. A lease was granted of a piece of land with two messuages thereon in course of erection, with a covenant by the lessee to complete the messuages within two months, *and also* to keep "the said messuages or tenements and premises in repair during the term,"—with a proviso for forfeiture for breach of any of the covenants. The premises never were finished, and were much dilapidated:—Held, that a forfeiture was incurred by the breach of the covenant *to repair*, in respect of which forfeiture the assignee of the reversion might sue. *Bennett* v. *Herring*, 370

And see LEASE.

FRAUDULENT ASSIGNMENT.

See BILL OF SALE.

FREE FROM AVERAGE.

See INSURANCE, 3.

GUARANTEE.

Parties.

1. P., D., and G. had severally advanced moneys to one F. on mortgage of three several parcels of land, and had severally brought actions against F. For putting an end to the actions, and securing these several debts, an indenture was prepared and executed, to which F. was a party of the first part, P. of the second, D. of the third, G. of the fourth, and certain other persons of the fifth part. By this indenture, F. covenanted to complete certain buildings on the mortgaged premises respectively, according to certain plans, and P., D., and G. covenanted to advance him a certain sum during the progress of the works. The defendants thereupon gave P., D., and G. a guarantee, stating, that, in consideration of the arrangements entered into by them, and their covenanting to advance the moneys mentioned to F. for the purpose of enabling him to complete the buildings, they guarantied that F. should perform his covenants with them in the indenture,—"the joint and separate liability of the defendants not to exceed 100*l.*:"—Held,

that P. alone could not maintain an action against the defendants upon the guarantee, the interest of the three therein being joint, and not several. *Pugh* v. *Stringfield*, 2

Construction of.

2. *Continuing guarantee.*]—The defendant addressed the following letters to the plaintiff:—"Feb. 13, 1851. I am Mrs. J.'s executor, and will pay you anything you may be pleased to advance Mr. T. A., from the first money I receive on his account." "Feb. 14, 1851. If you advance 100*l.* to Mr. T. A., or any other sum, I will undertake to pay you from the first money I have on his account, *upon having his authority so to do.*" The plaintiff having advanced T. A. 20*l.*, he addressed to the defendant an authority, as follows:—"Jan. 29, 1852. Please pay Mrs. H. the sum of 20*l.* by four instalments, namely, 5*l.* each quarter, from my estate, commencing from the 29th of September, 1852, until September, 1853: and, should any money be owing by me to her after that time, please to pay same as above:"—Held, —dubitante Williams, J.,—that this was a sufficient authority to the defendant to pay the plaintiff further advances beyond the 20*l.* *Horlor* v. *Carpenter*, 172

3. After verdict, the defendant's counsel insisted that the guarantee was not a continuing guarantee:—Held, that he was precluded from urging that point, on a motion for a new trial. *Id.*

4. In consideration that the plaintiff would advance 1200*l.* to a third person upon mortgage of certain leasehold premises, the defendants promised, that, if after any *sale* of the said premises duly made under the power of sale to be contained in the mortgage deed, the purchase-money should not be sufficient to satisfy the principal sum, and all interest, costs, charges, and expenses which might be then due in respect of the mortgage, they would immediately thereafter make good and pay to the plaintiff such deficiency, whether the same should be occasioned by any defect in the title to the premises or otherwise howsoever. The premises, having been put up to auction under the power of sale, were knocked down to one W. for 650*l.*, and W. paid a deposit of 100*l.*, and signed the usual contract: but he afterwards declined to complete the purchase, on the ground of the vendor's inability to produce certain receipts for ground rent; and the plaintiff brought an action against him to recover damages for his alleged breach of contract, which action was still pending:—Held, that, under these circumstances, a concurrent action against the defendants upon their guarantee was premature,—the word "sale" in that instrument meaning a sale *completed*, so that the deficiency which was to be made good by the defendants could be ascertained. *Moor* v. *Roberts*, 830

HUSBAND AND WIFE.

Liability of Husband for Necessaries supplied to the Wife.

1. *Money lent.*]—A husband is not liable for *money lent* to his wife, though it be afterapplied by her in procuring necessaries, for the supply of which he *would* have been liable. *Knox* v. *Bushell*, 334

2. A. lent B.'s wife 59*l.* for the purpose of enabling her to pay debts and to provide herself a passage to the Cape of Good Hope, whither she was going to join her husband, at his direction; and she so applied it:—Held, that A. could not recover any part of the amount from B. *Id.*

INCHOATE SCHEME.

See COST-BOOK MINE.

INSPECTION OF DOCUMENTS.

Where allowed.

1. Inspection, under the 14 & 15 Vict. c. 99, s. 6, can only be had in a case where a discovery could have been obtained by filing a bill in equity. *Gomm*, dem., *Parrott*, ten., 47

2. A demandant in dower is not entitled to inspection of the deed under which the property out of which he claims to be endowed was conveyed away by her husband, as against a bonâ fide purchaser for value, without notice of the marriage,—the balance of authorities being assumed to be in favour of the position that a bill for discovery could not be sustained in such a case. *Id.*

INSURANCE.

Contract of.

1. A. effected a policy "upon and for twenty years' continuance of the life of himself," with the Accumulative Life Fund and General Assurance Company. By the terms of the policy it was provided that "the capital stock and other securities, funds, and property of the company remaining at the time of any claim or demand unapplied and undisposed of, and inapplicable to prior claims and demands in pursuance of the provisions of the deed of settlement, should alone be liable to answer and make good all claims and demands upon the said company, or otherwise, under or by virtue of that policy;" and that no director, officer, or shareholder should be individually or personally liable, &c. The deed of settlement entitled policy-holders to participate in profits; and also contained provisions enabling the directors in certain events to dissolve the company. The directors having,—not in strict accordance

with their powers to dissolve the company,—transferred its funds and property to another company, who were to take their liabilities, A. brought an action against the company (his assurers), charging them with having wrongfully aliened and transferred their property, and ceased to carry on business, whereby he lost the moneys and profits he would otherwise have made from the continuance of the contract:—Held,—first, that there was no implied contract on the part of the company to continue to carry on the business,—secondly, that, if there were, there was no evidence of any breach of it, inasmuch as if the transfer was properly made, there was no cause of action, and, if not warranted by the deed of settlement, it was ultrà vires, and void,—thirdly, that the plaintiff had commenced his action before he had sustained any injury. *King* v. *The Accumulative Life Fund and General Assurance Company*, 151

Total Loss.

2. *On "goods."*]—An insurance was effected for "240*l.*, on goods so valued, *against total loss only*." The policy contained the usual memorandum against particular average under 3 or 5 per cent. The goods thus insured consisted of property of various descriptions in separate cases and packages, some of which were by a peril insured against totally lost, and others saved:—Held, on the authority of *Duff* v. *Mackenzie*, ante, p. 16,—that the assured was entitled to recover in respect of the packages so totally lost. *Wilkinson* v. *Hyde*, 30

3. *"Master's effects," free of average.*]—An insurance was effected on "*master's effects*, valued at 100*l.*, *free from all average*." Some of the articles thus insured were totally lost by the perils insured against, but others were saved:—Held,—distinguishing the case from *Ralli* v. *Janson*, 6 Ellis & B. 422,—that the assured was entitled to recover in respect of the goods which had been so totally lost; the word "effects" being obviously employed to save the enumeration of the different articles of which the subject-matter of insurance consisted. *Duff* v. *Mackenzie*, 16

Action for negligence in effecting,—See PRINCIPAL AND AGENT.

Life Assurance.

4. *Construction of policy.*]—Upon effecting a policy on his life, in February, 1855, the proposed assured signed a declaration, as the basis of the insurance, stating "that his age did not exceed twenty-nine years; that he had had the small-pox or cow-pox; that he had not had certain specified diseases; that no proposal to insure his life had been declined at any office; that he was then in good health, and did ordinarily enjoy good health; and that *he was not aware of any disorder or circumstance tending to shorten his life, or to render an insurance on his life more than usually hazardous*, unless anything stated in answer to certain questions which preceded the declaration might be so considered."

In an action upon the policy, by the administrator of the assured, it appeared, that, in 1853 and 1854, the deceased had had two severe bilious attacks. A medical man who had attended him on those occasions stated that there was nothing in those illnesses which tended to shorten his life or to render it less insurable, and that his state of health after them was as good as ever. Two other medical men,—one of whom had seen him on the last occasion,—stated, that, in their judgment, those illnesses did tend to shorten his life and to render him ineligible for insurance; but it did not appear that their opinions had ever been communicated to the assured. The judge told the jury, that, "if the assured honestly believed at the time he made the declaration, that the bilious attacks had no effect upon his health, and did not tend to shorten his life or to render an insurance upon it more than usually hazardous, the fact that he was aware that he had had those attacks, even though (without his knowledge) they had such a tendency, would not defeat the policy:"—Held, that this direction was correct. *Jones* v. *The Provincial Insurance Company*, 65

5. *Payment of premium after the days allowed by the condition, and after the death of the party insured.*]—A policy was effected, in the usual form, on the life of A., in consideration of the payment of certain annual premiums on the 13th of October in each year,—with a condition that the policy should be void, amongst other grounds, "if the premiums were not paid within *thirty days* after they should respectively become due; but that the policy might be revived within three calendar months, on satisfactory proof of the health of the party on whose life the insurance was made," and payment of a certain fine. An annual premium *became due on the 13th of October*, 1855. The *thirty days* allowed by the condition for payment of the premium *expired on the 12th of November,—on which day A. died.* On the 14th of November, the plaintiff (for whose benefit the policy was effected) sent the company a check for the premium, for which they on the following day obtained the cash, giving a receipt as for "*the premium for the renewal of the policy to October 13th, 1856, inclusive*,"—both parties being ignorant that A. was then dead:—Held, that the payment did not under the circumstances revive the policy. *Pritchard* v. *The Merchant's and Tradesman's Mutual Life Assurance Society*, 622

6. And *semble*, that, the contract being for payment of the sum insured on the *future* event of the death of A., a payment of the premium *within the thirty days*, but *after A.'s death*, would not be a payment within the condition. *Pritchard* v. *The Merchant's and Tradesman's Mutual Life Assurance Society*, 622

INVOICE PRICE.
See DAMAGES.

IRISH JUDGMENT.
See FOREIGN JUDGMENT.

IRREGULARITY.
Waiver of,—See PROCEDURE.

JERSEY.
Service of process at,—See PROCEDURE, 1.

JOINT AND SEVERAL INTEREST.
See COVENANT.

JOINT STOCK BANK.
Execution against Shareholders under 7 & 8 Vict. c. 113, s. 13.

1. A shareholder whose name is properly inserted in the last-delivered memorial, remains liable to execution under the 13th section of the 7 & 8 Vict. c. 113, although he has subsequently bonâ fide transferred his shares, and the transfer-deed has been duly executed by the transferree, and registered under s. 23. *Fry* v. *Russell*, 665
2. *Liability of executors.*]—The executors of one whose name has since his decease been inserted in the last-filed memorial or return (under the 7 & 8 Vict. c. 113, s. 16), are not liable to execution on a judgment against the company, although the testator was properly returned as a shareholder in previous memorials. *Powis* v. *Butler*, 645

JOINT STOCK COMPANY.
See COST-BOOK MINE.
Contracts by.

1. A departure from the formalities required by the deed of settlement of a joint stock company does not affect the validity of a contract under its common seal. *Agar* v. *The Athenæum Life Assurance Society*, 725
2. It is no defence, therefore, to an action against a joint stock company upon a debenture sealed with their common seal, that the borrowing of the money thereby secured was not sanctioned by a resolution of an extraordinary general meeting of the shareholders, pursuant to the provisions of their deed of settlement. *Id.*
3. By the 12th clause of the deed of settlement of a joint stock company, it was provided that it should be competent for any extraordinary general meeting, and no other, by a majority of at least two-thirds of the shareholders, by any resolution to increase the capital stock of the company by creating new shares, and also to empower the directors to borrow money on mortgage or on such other securities as to the meeting might seem fit. The 27th clause provided that it should be lawful for the directors to effect insurances on lives and survivorships, to sell out and purchase reversions and annuities, and to grant endowments for children, and generally to effect all such other insurances, whether life, guardian, guarantee, or otherwise, upon such terms and conditions and in such manner as the directors should think proper. The 28th provided that any policy, endowment, grant of annuity, *or other instrument* required in any of the transactions aforesaid, should be given under the hands of not less than *three* of the directors, and sealed with the common seal of the society. And the 35th provided that the directors should have power, with the consent of an extraordinary general meeting in the manner thereinbefore provided, to borrow, on mortgage or otherwise, such moneys as they should think expedient:—Held, that the 28th clause applied only to instruments and transactions ejusdem generis with those mentioned in the 27th, and not to debentures. *Agar* v. *The Athenæum Life Assurance Society*, 725
4. And *semble*,—per Williams, J.,—that a joint stock company cannot by its deed of settlement declare that deeds given by them,—which, under the 44th and 46th sections of the 7 & 8 Vict. c. 110, are valid if signed by *two* of the directors,—shall not be valid unless signed by *three*. *Id.*

JUDGMENT.
Satisfaction of.

1. The discharge of a defendant from custody under a ca. sa. operates in law as an absolute satisfaction of the judgment. *Cattlin* v. *Kernot*, 796
2. *Entry on roll.*]—The defendant being in execution on a ca. sa. at the suit of the plaintiff, the latter consented to his discharge upon the former withdrawing a notice he had given to dispute a flat which had issued against him. The defendant afterwards procured the flat to be superseded. The plaintiff having registered the judgment,—the court made absolute a rule to enter satisfaction on the roll. *Id.*

LANDLORD AND TENANT.
Distress for Rent.

1. The right of distress is not so inseparable an incident of rent-service as not to be ca-

pable of being postponed. *Giles* v. *Spencer*, 244

2. A., who was tenant of a house, let certain rooms on the ground-floor thereof to B., under a written agreement, for one year, and so on from year to year, subject to a quarter's notice, with a stipulation that no action, distress, or other proceeding should be prosecuted by or on behalf of A. in respect of the rent, unless he should have previously paid the rent due from himself to the superior landlord, and should have produced his receipt for the same to B. Upon B.'s death, C. (her daughter and executrix) continued to occupy the premises for some time upon the same terms as her mother had occupied them, and she afterwards agreed verbally with A. to give up the rooms on the ground-floor, and to take other rooms on the first floor in lieu of them, upon the same terms as to rent and otherwise:—Held, that, by the condition in the original agreement, A.'s right to distrain was postponed until after his rent had been paid; and that C. was therefore entitled to maintain trespass against a broker employed by A. to distrain without having previously complied with that condition. *Id.*

3. And, held, that the substitution of the rooms on the first floor for those on the ground-floor, was not an alteration by parol of the terms of the original written agreement, but a new contract. *Id.*

Illegal Distress.

4. A. authorized B., a broker, to distrain for rent due to him from C. B., having entered for the purpose of executing the warrant, took away, amongst other things, certain books and papers (which were assumed not to be distrainable), and omitted to insert them in the inventory:—Held, that A. was liable, jointly with B., in trespass. *Gauntlett* v. *King*, 59

LEASE.

Forfeiture.

1. Premises consisting of a wharf and dock, dwelling-house, wash-house, and court-yard, were demised under a lease containing a covenant that the lessee, his executors, &c., should not erect or build any edifice or structure whatsoever on the wharf and dock, or place goods thereon above a certain height, &c., "nor do any other matter or thing of any nature or kind which might obstruct the view of the river from the White Hart public-house, or that should grow or be a nuisance or annoyance to the occupier thereof," nor carry on a certain trade thereon, "nor make any external alteration whatever in the said premises, nor any internal alterations in the said dwelling-house that may lessen the value thereof, without the consent in writing of the lessor for that purpose;" with a proviso for re-entry for a breach:—Held, that this covenant absolutely prohibited all *external* alteration in any part of the demised premises, and that the qualification as to lessening "the value thereof" applied only to *internal* alterations in the *dwelling-house*. *Perry* v. *Davis*, 771

Waiver of Forfeiture.

2. Mere standing by and seeing the lessee making alterations which are in breach of his covenant, does not operate as a waiver on the part of the lessor. *Perry* v. *Davis*, 769

LIFE POLICY.

See INSURANCE, 4, 5, 6.

LIMITATION OF ACTIONS.

Acknowledgment to take the Case out of the Statute.

1. The defendant being called upon by a creditor (the holder of two promissory notes for 510*l.* more than six years overdue) for a statement of his affairs, made out an account in which the notes were inserted as a debt for which he was liable:—Held, a sufficient acknowledgment within the 9 G. 4, c. 14, s. 8, to take the case out of the statute of limitations. *Holmes* v. *Mackrell*, 789

2. To take a case out of the statute of limitations, the following endorsement on the back of a promissory note was offered in evidence,—"This note is renewed by the re-signing of the parties, this 7th of March, 1855," followed by their respective signatures:—*Quære*, whether it was admissible? *Id.*

3. *Signature.*]—Held also, that, the whole document being in the handwriting of the defendant, his name written *at the top* was a sufficient "signature" to bind him. *Id.*

LOCAL ENCLOSURE ACT.

See TITHE RENT-CHARGE.

LORDS' ACT.

See PRISONER.

MASTER'S EFFECTS.

See INSURANCE, 8.

MEASURE OF DAMAGES.

See DAMAGES.

MEMORANDA.

Judges.

Appointment of Cresswell, J., to the Court of Probate and Divorce Court, 441

Appointment of Byles, J., to the Common Pleas, 441

Death of Maule, J., 848

Queen's Counsel:

Amphlett, Bazalgette, Fleming, Goldsmid, Greene, Shapter, Toller, 442

MERGER.

See DEVISE.

METROPOLIS LOCAL MANAGEMENT ACT.

Construction of 18 & 19 *Vict.* c. 120.

An action upon a contract for cleansing the streets of a parish, entered into by the trustees under a local act, is, by virtue of the 90th, 93d, 94th, and 95th sections of the Metropolitan Local Management Act, 18 & 19 Vict. c. 120, properly brought against the district board created under the last-mentioned act. *Sinnott* v. *Whitechapel Board of Works*, 674

MINE.

Liability of Directors of a Cost-Book Mine, where the Scheme proves abortive.

Seven individuals associated themselves together for the formation and working of a mine upon the cost-book principle, and issued a prospectus describing the company as having a capital of 12,000*l.*, in 12,000 shares of 1*l.* each, to be paid upon allotment; and setting forth the usual reports of the mining captain that the mine was in full operation, and stating that the money was to be paid to Messrs. L. & Co., the bankers of the company. The plaintiff applied for and obtained an allotment of fifty shares, and paid 50*l.* to L. & Co., who gave him a receipt describing that sum as having been received by them for *the company*. The plaintiff, having afterwards discovered that not more than 1435 shares had ever been subscribed for or paid upon, brought an action against the directors to recover back his deposit, on the ground of failure of consideration:—Held,—affirming the judgment of the Court of Common Pleas,—that *all* the directors were liable, notwithstanding the account at the bankers' was kept *in the names of five of them only*. *Johnson* v. *Goslett*, 569

MINING COMPANY.

See COST-BOOK MINE.

MISDIRECTION.

1. In an action by heir-at-law against devisee,—the question in issue being as to the capacity of the testator to make a will—the judge in his summing-up told the jury "that the heir-at-law was entitled to recover unless a will was proved: but that, when a will was produced, and the execution of it proved, the law presumed sanity, and therefore the burthen of proof was shifted; and that the devisee must prevail, unless the heir-at-law established the incompetency of the testator; and that, if the evidence was such as to make it a measuring cast, and leave them in doubt, they ought to find for the defendant:"—Held, a misdirection. *Sutton* v. *Sadler*, 87

2. Upon a question between heir and devisee as to the competency of the testator at the time of making the will, a witness having been called on the part of the defendant to prove certain statements made by him relative to the property he took under the will of his father,—the last-mentioned will was offered, as well to show the opinion entertained of him by his father as to competency to manage property, as to show that the statements so proved to have been made by him were consistent and true. Upon an objection taken by the plaintiff's counsel to its admissibility, and a doubt being expressed by the learned judge, the defendant's counsel withdrew the document:—Held, that the circumstance of the judge, in his summing up, observing upon the objection and the non-production of that will as affording a fair inference that the will if produced would show that the testator (whose will was in question) well knew what he was saying when he made the declarations respecting it, was no misdirection,—although apparently giving effect to evidence which had been ruled to be inadmissible. *Sutton* v. *Sadler*, 99

3. Held also, that it was no misdirection in point of law to tell the jury that they might take into their consideration statements made by the testator as to the dispositions contained in his will, and which in fact corresponded therewith, as throwing back light on the period at which the will was executed (a year before), and as affording means of inferring what was the state of his competency at that period. *Id.*

MOLESTATION.

See EVICTION.

MONEY LENT.

See HUSBAND AND WIFE.

MORTGAGE.

Eviction or Disturbance by Mortgagee,—See EVICTION.

NEGLIGENCE.

Liability of Agent for,—See PRINCIPAL AND AGENT, 2.

And see RAILWAY COMPANY.

NEW TRIAL.

Excessive Damages.

The court refused to grant a new trial on the ground that the damages were excessive, where the jury had given 750*l.* in an action for defamatory words spoken of a beneficed clergyman to his curate. *Highmore* v. *The Earl and Countess of Harrington*, 142

NUL TIEL AGARD.

See ARBITRAMENT, 1.

PARTNERSHIP.

What amounts to.

A. and B., who had carried on business as iron-masters, being unable to meet their engagements, assigned all their plant and effects to five trustees, upon trust, amongst other things, to *carry on the business* under the name of "The Stanton Iron Company," and, *out of the profits*, to pay interest on certain mortgages, &c., and to "pay and divide the net income of the business remaining after answering the purposes aforesaid, unto and among all the creditors of A. and B., in rateable proportions according to the amount of their respective debts,"—with an ultimate trust for this deed, and thus assented to the business having held that the *creditors* who executed A. and B. The Court of Common Pleas being carried on for their benefit, thereby became liable as *partners* for the amount of a bill of exchange accepted in the name of The Stanton Iron Company, in respect of a debt contracted by the trustees in carrying on the trade under it,—the judges of the Exchequer Chamber, on appeal, were equally divided in opinion; Coleridge, J., Erle, J., and Crompton, J., agreeing with the court below that the deed made the creditors partners; Martin, B., Bramwell, B., and Watson, B., holding that it did not. *Hickman* v. *Cox*, 523

PLEADING.

Nul tiel agard,—See ARBITRAMENT, 1.

Equitable Defence under 17 *&* 18 *Vict. c.* 125, *s.* 83.

1. To an action by endorsees against the drawers of a bill of exchange, the court refused to allow the defendants to plead, by way of equitable defence, that a debt was due to the plaintiffs from a public company which had professed to assign its business and obligations to the defendants, that the bill was afterwards given by the defendants in consideration of that debt, and upon the supposition that the assignment was legal and valid, whereas it proved to be illegal and void,—the proposed plea affording no defence to the action, either legal or equitable. *Balfour* v. *The Sea Fire Life Assurance Company*, 300
2. An equitable defence under the 17 & 18 Vict. c. 125, s. 83, is admissible only where it sets up matter in respect of which a court of equity would have granted relief unconditionally. *Flight* v. *Gray*, 320
3. The court therefore refused to allow a defendant to plead to an action against him as acceptor of a bill of exchange, that the bill was a renewal of a former bill which had been accepted upon a distinct understanding that it was to be renewed from time to time until the defendant should be of ability to meet it, he paying in the mean time interest at 10 per cent., that the defendant had always performed his part of the agreement, but that the plaintiff had refused to renew the bill upon application for that purpose, although he well knew that the defendant was not of ability to pay it. *Id.*
4. In an action upon a contract for the supply of a certain quantity of coals during a period of six months, two breaches were assigned,—first, that the defendants refused to take the stipulated quantity of coals,—secondly, that they omitted to pay for those which they had received in the manner provided for by the agreement, viz., by bills at three months from the 1st and 14th of each month.

   The defendants having obtained a judge's order allowing them to add two pleas, to the following effect,—"1. *On equitable grounds*, that, during the said six months, a dispute arose between the plaintiff and the defendants, and, after the lapse of the said six months, it was agreed that such dispute should be settled, and that defendants should take as many cargoes as remained untaken, and that plaintiff should allow defendants for any quantity of small coals in such cargoes exceeding six per cent., and that *the agreement in this plea mentioned should be accepted in satisfaction of the said breach of contract*, and that defendants were always ready and willing to perform the said agreement. 2. On equitable grounds, that, after the said cargoes in the second breach mentioned were supplied, and after the breaches, accounts were had and stated, and in such accounting a sum was agreed upon as the sum to be paid to the plaintiff after deducting the sums due from the plaintiff to the defendants, and that plaintiff should take bills of exchange for the amount so agreed upon, and that defendants delivered bills of exchange, and paid the bills so given,"—

   The court, on motion, varied the order, by allowing the defendants to plead the first of the two pleas, striking out "*on equitable grounds*,"—and to plead another plea in the

same form on equitable grounds, omitting the allegation *as to the acceptance in satisfaction*, and directing that the second plea on equitable grounds should remain,—the plaintiff to be at liberty to reply or demur. *Jonassohn* v. *Ransome*, 779

POLICE COURT.

Privilege of Witness or Prosecutor from Arrest,—See WITNESS.

POST-TERMINAL SITTINGS.

See SITTINGS IN BANC.

POWER OF LEASING.

See EVICTION.

PRESCRIPTIVE WAY.

See WAY.

PRESENTMENT.

See CHECK.

PRESUMPTION.

1. That an instrument is drawn at the time of its date. *Laws* v. *Rand*, 442

Of a Testator's Sanity.

2. The presumption that every man is sane, until the contrary is proved, is not a presumption of law, but a presumption of fact, or, at the most, a mixed presumption of *law and fact*. *Sutton* v. *Sadler*, 87

PRINCIPAL AND AGENT.

Rights of Agent.

1. A., acting for B., a foreign principal, but *in his own name*, bought of C., in London, a cargo of wheat on board a certain vessel represented to be on its way from Galatz, payment to be made in cash on delivery of the shipping documents. Having paid the price at the request of his principal, A. drew upon him for the amount, and the bill was duly paid. B. afterwards came to London, *saw the contract, and ratified all that A. had done*. It turned out that the cargo had been fraudulently disposed of by the captain prior to the date of the contract of sale by C. to A.:—Held, that B. could not maintain an action against A. to recover back the money paid, as upon a failure of consideration; but that his only remedy,—whether in his own name or in that of A.,—was against C., the seller. *Risbourg* v. *Bruckner*, 812

Liability of Agent for Negligence.

2. *In effecting Insurance.*]—A., a merchant at Seville, wrote to B., his agent at Liverpool, desiring him to insure a cargo of fruit to that place. B., acting bonâ fide, instructed one C., a person who had occasionally acted as A.'s agent in London, to get a policy effected there. C. for that purpose employed one D., an insurance-broker, who effected the policy in his own name, and afterwards received the amount of a loss from the underwriters, but retained it, claiming a lien for a debt due to him from C. in respect of premiums and commission on former transactions. In an action by A. against B. for negligently omitting to effect a good and available insurance upon the cargo, and neglecting to take steps to get the money, and for money had and received, the judge,—treating it as immaterial whether the letter of instructions from B. to C. had been shown to D. or not,—ruled that B. had violated his duty as agent, by employing another agent in London, instead of effecting the policy himself, and that he was responsible for the whole amount received from the underwriters by D.:—Held, that this was not the true measure of damages; for, that, if B.'s letter of instructions had been shown to D. at the time he was employed to effect the policy, he could acquire no lien upon the proceeds for the debt due to him from C., and his unlawful detention of the money could not give A. a right of action against B. for the whole amount so received by D., though B. might be liable for some nominal damages in respect of the breach of his duty as agent; and therefore that fact ought to have been ascertained. *Cahill* v. *Dawson*, 106

2. But, *quære* whether the conduct of B. did amount to a breach of duty? *Id.*

PRISONER.

Discharge from Execution,—See BANKRUPT.

Discharge of, under 48 *G.* 3, *c.* 123, *s.* 1.

1. Where an application for the discharge of a prisoner, under the 48 G. 3, c. 123, on the ground that he has been detained in execution for a year for a sum under 20*l.*, is made before the expiration of the ten days' notice mentioned in the 129th rule of Hilary, 1853, a rule nisi only can be granted. *Doye* v. *Eley*, 764

2. *In ejectment.*]—A defendant who has lain in prison in execution on a judgment in ejectment for more than twelve months, is still entitled to be discharged on motion, under the 48 G. 3, c. 123, s. 1, notwithstanding the alteration in the form of the proceedings under the Common Law Procedure Act, 1852. *Humphreys* v. *Franks*, 765

PRIVILEGE FROM ARREST.

See WITNESS.

PROCEDURE.

Under the Common Law Procedure Act, 1854, s. 18.

1. A writ of summons issued under the 18th section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), was served on the 17th of September upon a British subject residing out of the jurisdiction (at Jersey): on the 27th of October, the plaintiff obtained an order for leave to proceed, and filed a declaration on the 28th, charging the defendant with a breach of promise of marriage; but the affidavit upon which the order was obtained was not so framed as to bring the case within the statute:—*Semble*, that the propriety of the order might be impeached on that ground. *Bayne* v. *Slack*, 363
2. But, held, that, in order to take advantage of the irregularity, it was incumbent on the defendant to apply within a reasonable time, according to the exigency of the 135th rule of Hilary, 1853; and that the irregularity was waived by taking the declaration out of the office. *Id.*

PROCESS.

See PROCEDURE.

PROSECUTION.

See WITNESS.

PUBLIC COMPANY.

See COST-BOOK MINE.

QUIET ENJOYMENT.

See EVICTION.

RAILWAY COMPANY.

Action against for Negligence in Arrangements at the Station.

1. On the platform of a railway station there were two doors in close proximity to each other, the one, for necessary purposes, had painted over it the words, "For gentlemen," the other had over it the words, "Lamp-room." The plaintiff, having occasion to go to the urinal, inquired of a stranger where he should find it, and having received a direction, by mistake opened the door of the "lamp-room" and fell down some steps and was injured. In an action against the railway company:—Held, that, in the absence of evidence that the place was more than ordinarily dangerous, the judge was justified in nonsuiting the plaintiff, on the ground that there was *no evidence* of negligence on the part of the company. *Toomey* v. *The London, Brighton, and South Coast Railway Company*, 146

Proceedings against, under the Railway Traffic Act.

2. *Unequal charges.*]—A railway company possessed of a line from B. to C., advertised to convey goods from A. to C. (in conjunction with another company) at the rate of 50*s.* per ton, *provided they were consigned by and to their own agents at those respective places;* but, if consigned to any one else, they charged 2*s.* 6*d.* per ton more:—Held, ground for an injunction under the Railway Traffic Act, 17 & 18 Vict. c. 31. *In re Baxendale and the North Devon Railway Company*, 324
3. And the rule was made absolute *with costs*, although it prayed a writ enjoining the company to charge an equal rate for the carriage from A. to C., and the writ was granted as from B. to C. only. *Id.*
4. *Semble*, that both companies ought to have been brought before the court by the rule. *Id.*
5. A railway company agreed with the lessees of certain collieries to carry their coals at a somewhat lower rate of tonnage than they carried for others, in consideration of the owner of those collieries having laid out a large sum in constructing tram-ways to connect them with the railway: they also made a further reduction, under the influence of a threat, that, unless they acceded to the terms proposed by the lessees, the owner would construct another line of railway direct from the collieries to the place of shipment, for the use of his tenants, and so would divert from the company a very considerable and essential portion of their traffic:—Held, that neither of these was a justifiable reason for the "undue preference" thus given. *In re Harris and the Cockermouth and Workington Railway Company*, 693
6. The court refused to grant a rule for an injunction against the Eastern Counties Railway Company, under the Railway Traffic Act, 1854, to compel them to issue season tickets between Colchester and London on the same terms as they issued them between Harwich and London,—upon a mere suggestion that the granting the latter (the distance being considerably greater) at a much lower rate than the former, was an undue and unreasonable preference of the inhabitants of Harwich over those of Colchester. *In re Jones and the Eastern Counties Railway Company*, 718

Scire Facias against a Shareholder under the 8 & 9 Vict. c. 16.

7. The affidavits upon a motion for a scire facias against a shareholder in a railway company are properly intituled in the original action. *Edwards* v. *The Kilkenny and Great Southern and Western Railway Company (in re Roberts)*, 786; *In re Colls*, 787

8. It is not necessary that the affidavits should *in express terms* state that the judgment remains unsatisfied; it is enough if that fact can be fairly inferred from that which is stated and not contradicted. *Edwards* v. *The Kilkenny and Great Southern and Western Railway Company, In re Colle,* 787

9. And it is no answer to the application, that the works have not been completed within the period limited by the special act, and that therefore the powers granted to the company "for making the railway, *or otherwise in relation thereto,*" are at an end. *Id.*

RECEIVER.

See ARBITRAMENT, 5.

REGULÆ GENERALES.

Appeals under the Statute 20 *&* 21 *Vict.* c. 43.

1. It is ordered, that, in cases of appeal to a superior court under the provisions of the statute 20 & 21 Vict. c. 43, the 15th and 16th rules of Hilary Term, 1853, so far as the same are applicable, shall be observed. 141

2. And, in cases where the appeal is to be heard before a judge at chambers, the appellant shall obtain an appointment for such hearing, and shall forthwith give notice thereof to the respondent, and shall, four clear days before the day appointed for the hearing, deliver at the judges' chambers a copy of the appeal. 141

Declaring on Writs under the Bills of Exchange Act, 1855.

3. Whereas, by a rule of court of Michaelmas Term, 1855, with respect to endorsements on writs under the Bills of Exchange Act, 1855, it was, amongst other things, ordered "that no other claim than a claim on a bill of exchange or promissory note should be included in writs under the Summary Procedure on Bills of Exchange Act, 1855:" And whereas it is expedient that the said rule should be explained and amended: It is hereby ordered, that, where a defendant obtains leave to appear according to the said act, and enters [an] appearance to any such writ, according to the said rule of Michaelmas Term, 1855, the plaintiff may include in his declaration, together with a count on the bill of exchange or promissory note (as the case may be), a count upon the consideration, if any, between the plaintiff and defendant, and deliver a particular of demand accordingly. H. 1858. 620

RENT-CHARGE.

See TITHE RENT CHARGE.

RENT-SERVICE.

See LANDLORD AND TENANT, 1.

REVERSION.

Assignee of,—See FORFEITURE.

REVERSION IN FEE.

See DEVISE.

RIGHT TO BEGIN.

In ejectment by heir against devisee, the heirship being admitted, the defendant is entitled to begin. *Sutton* v. *Sadler,* 87

RIGHT OF WAY.

See WAY.

SALE.

See GUARANTEE.

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See JUDGMENT.

SCIRE FACIAS.

Against a Shareholder in a Railway Company,—See RAILWAY COMPANY, 7, 8, 9.

SITTINGS IN BANC.

Post-Terminal Sittings.

Notice.]—At the post-terminal sittings in banc, no business can be taken except that of which notice has been given pursuant to the 17 & 18 Vict. c. 125, s. 95. *Tabor* v. *Edwards,* 64

SUBMISSION.

See ARBITRAMENT.

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See FOREIGN JUDGMENT.

SUMMONS.

See PROCEDURE. WRIT OF SUMMONS.

TITHE RENT-CHARGE.

Under a Local Enclosure Act.

1. *Action for, against whom maintainable.*]—By a local enclosure act,—reciting that the defendants, amongst others, were owners and proprietors of old enclosed lands within the parish,—it was (by s. 61) provided that the tithes should be extinguished and certain yearly corn-rents substituted, such yearly rents to be "issuing and payable for ever from and out of the several lands and tenements to be charged therewith as aforesaid," and to be paid to the rector at the rectory-house on the four usual quarter days. The 62d section provided that the rector, in addition to all present powers for recovery

of tithes and compositions, should have the same powers and remedies for recovering them as by common law or statute were given to landlords for the recovery of rack-rent in arrear. And the 63d section, having provided for the apportionment of the rent-charge in case of the division of the land, concludes by enacting that such apportioned part of the rent "shall and may be recovered from the lands or hereditaments so charged therewith, or *from the owners thereof*, in such and the same manner as the whole of the said yearly corn-rents or sums are hereby made recoverable:"—Held, that the rector could not maintain an action against the owners of the land for the recovery of the rent-charge thus created. *Bedford* v. *The Wardens and Society of Sutton Coldfield*, 449

2. *Distress.*]—Held also, that a distress by the rector for the amount of the rent-charge imposed upon the lands of a proprietor acquired by him *before* the passing of the act, and also for the amount of the rent-charge imposed upon other lands in the parish acquired by him *since* the passing of the act, jointly, was illegal. *Silvester* v. *Bedford*, 449

3. But held, by Williams, J., Crowder, J., and Willes, J.,—dissentiente Cockburn, C. J.,—that a distress might be levied, in respect of the whole rent-charge imposed on all the lands in the parish belonging to the same owner, upon an occupier of any part thereof. *Id.*

TOTAL LOSS.

See INSURANCE, 2, 3.

TRESPASS.

Where maintainable.

A. authorised B., a broker, to distrain for rent due to him from C. B. having entered for the purpose of executing the warrant, took away, amongst other things, certain books and papers (which were assumed not to be distrainable), and omitted to insert them in the inventory:—Held, that A. was liable, jointly with B., in trespass. *Gauntlett* v. *King*, 59

VENDOR AND PURCHASER.

See GUARANTEE.

VENUE.

Changing.

The court will not deprive the plaintiff of the right to lay his venue where he pleases, unless there is a manifest preponderance of convenience in a trial at the place to which it is sought to change the venue. *Helliwell* v. *Hobson*, 761

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Of Forfeiture.

Mere standing by and seeing the lessee making alterations which are in breach of his covenant, does not operate as a waiver on the part of the lessor. *Perry* v. *Davis*, 769

Of Irregularity in Process,—See PROCEDURE, 2.

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Abandonment of.

A parol agreement for the substitution of a new way for an old prescriptive way, and a consequent discontinuance to use the old way, afford no evidence of an *abandonment* thereof. *Lovell* v. *Smith*, 120

WILL.

Competency of Testator.

1. The presumption that every man is sane, until the contrary is proved, is not a presumption of law, but a presumption of fact, or, at the most, a mixed presumption of *law and fact*. *Sutton* v. *Sadler*, 87

2. The competency of a testator is to be assumed until it is impeached by evidence: but it is not to be assumed, as a matter of law, that a will is valid, as made by a competent testator, unless the court or jury who have to decide upon it are convinced that he was *competent*. *Id.*

3. Therefore, he who relies upon a will, in opposition to the title of the heir-at-law, must prove that it is the will of a person of sound and disposing mind. Such proof having been given, if incompetency of the testator to make a will be alleged, it is incumbent on the party alleging it to prove it. *Id.*

4. In an action by heir at law against devisee,—the question in issue being as to the capacity of the testator to make a will,—the judge in his summing up told the jury "that the heir at law was entitled to recover unless a will was proved: but that, when a will was produced, and the execution of it proved, the law presumed sanity, and therefore the burthen of proof was shifted; and that the devisee must prevail, unless the heir at law established the incompetency of the testator; and that, if the evidence was such as to make it a measuring cast, and leave them in doubt, they ought to find for the defendant:"—Held, a misdirection. *Id.*

WITNESS.

Attendance of,—See COSTS, 3.

Privilege from Arrest.

A person attending *a police court* as prosecutor or witness on a charge there pending, is privileged from arrest on civil process,—even though he is not attending on compulsion. *Mountague* v. *Harrison*, 292

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TO

THE REGISTRATION APPEALS.

I.—*Cases decided upon the Construction of the* Reform Act, 2 *W.* 4, *c.* 45.

II.—*Cases decided upon the Construction of the* Registration Act, 6 *&* 7 *Vict. c.* 45.

III.—*Particular Points.*

I. *Cases decided upon the Construction of the* Reform Act, 2 *W.* 4, *c.* 45.

Section 18.—*Estate "by promotion to an office," or "by devise."*

1. Pursuant to the trusts of two wills, certain lands in Northamptonshire were purchased in 1776, and vested in trustees upon trust to apply the rents and profits, amongst other charitable purposes, to and amongst certain persons described as "the six beadsmen of Daventry," as to whose origin there was no evidence. The persons thus described had received 50*s.* a year each for the last twenty years; but they had all been appointed since the passing of the Reform Act, by resolution of the bailiffs and burgesses of Daventry, in whom the appointment had from very early times been vested, and who were also trustees under the above-mentioned wills:—Held, that the parties so appointed had not an estate which came to them by promotion to *an office* within the meaning of the 2 W. 4, c. 45, s. 18, and therefore were not entitled to be registered. *Faulkner*, App., *Upper Boddington* (*Overseers*), Resp., 412

2. *Rent-charge.*]—Lord Crewe, by his will, in 1720, devised lands in Hunstonworth, in the county of Durham, of the net yearly value of 735*l.*, and also lands in Northumberland, of the net yearly value of 5600*l.*, to five trustees in fee, upon trust out of the rents, &c., thereof to pay certain yearly sums to certain persons, amongst others, "the yearly sum of 10*l.* apiece to each of the fellows of Lincoln College, Oxford,"—the aggregate of such yearly sums being 740*l.*; and he directed that all the annual payments to be so made should be made to the bursar of the college for the time being, to be by him paid for the uses aforesaid:—Held, that the fellows were not owners of a *rent-charge*, there being no power of distress; nor of a rent of any sort of the value of 10*l.* a year *issuing out of lands in Durham*. *West*, App., *Robson*, Resp., 422

3. *Estate by devise.*]—Held also, that their interest was not an estate coming to them *by devise*, within the meaning of the 18th section of the Reform Act, 2 W. 4, c. 45. *Id.*

4. *Promotion to a benefice or office.*]—Or by promotion to a *benefice* or *office* within that section. *Id.*

5. *Cestuis que trust.*]—Whether they could be considered as cestuis que trust in actual occupation of any part of the lands, so as to be entitled to freeholds at all,—*quære?* *Id.*

6. *Apportionment.*]—But, held, that, at all events, they were not possessed of freeholds of the value of 40*s.* a year in Durham, inasmuch as the net proceeds of the lands in the two counties must be rateably apportioned for the payment of all the sums charged thereon under the will, and, so apportioning them, the value in Durham was not sufficient to give each of the donees 40*s.* per annum. *Id.*

Section 27.—*Occupation "as owner or tenant."*

7. The inmates of the Earl of Leicester's Hospital,—a charity regulated by a private act of parliament,—each had allotted to him by the master rooms therein of more than the yearly value of 10*l.*, of which he had the exclusive use. The appointment was for life, subject to removal for breach of any of the rules. The inmates were rated in respect of their several occupations:—Held, that they did not occupy "as owners or tenants" within the 27th section of the Reform Act, and therefore were not entitled to be registered. *Heath*, App., *Haynes*, Resp., 389

8. *Rating.*]—Rating is not the test of occupation *as tenant.* *Id.*

II. *Cases decided upon the Construction of the* REGISTRATION ACT, 6 *& 7 Vict. c.* 18.

Sections 4, 5. *Notice of claim.*

1. *Sufficiency of*]—The sufficiency of a notice of claim under the 6 & 7 Vict. c. 18, s. 4, is for the overseers; and, where they have acted upon it, by inserting the claimant's name in their list, pursuant to s. 5, it is not competent to the revising barrister to inquire whether its form is in compliance with the statute. *Davies*, App., *Hopkins*, Resp., 376

2. *Signature.*]—Whether such notice requires the *personal* signature of the claimants,—*quære? Davies*, App., *Hopkins*, Resp., 376

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